To: Clerk Supreme Court
From: Terrance R. Bacon (P-25127)
Date: May 31, 2005
Re: ADM File No. 2003-62

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Comments of Terrance R. Bacon
5/31/2005

I. Introduction

Most of the comments I have read have focused on a few particular aspects of the proposed rules. Similarly, the recommendations made by the Representative Assembly focused on a few major issues. The Representative Assembly should be congratulated for its attempts to thoroughly discuss those fundamental concepts, but the Representative Assembly is not a body well suited to detailed review and discussion.

The State Bar Committee on Professional and Judicial Ethics ("Ethics Committee") is made up of busy lawyers (and judges) who undoubtedly expended considerable time in reviewing the proposed rules. Nevertheless, the Ethics Committee appears to have similarly focused only on major points of departure from the ABA rules (with, perhaps, a pre-conceived viewpoint to limit those departures), rather than focusing on the nitty-gritty of the rules (and comments) as proposed and as they exist currently in Michigan. Certainly, the Ethics Committee did not defer on all subjects to the ABA, as the Committee's proposal departs from the ABA's Model Rules in several important respects (*e.g.*, correctly continuing Michigan's established practice of permitting "screening" to address conflicts arising when lawyers change firms). There is nothing to suggest, however, that the Committee gave close attention to making changes other than those proposed by the ABA.

Comments (including the Representative Assembly's) that focus only on major issues carry the danger that, by implication, the proposed amendments can be placed in "good order" by some tinkering here and there. In other words, the unstated premise (and maybe it is stated somewhere) is that the ABA's work is to be adopted, except in a few areas of particular significance.

My conclusion is to the contrary. This Court is undertaking, as it should from time-to-time, to possibly adopt significant changes in the ethical rules governing Michigan lawyers. In doing so, the Court should not limit itself to accepting or rejecting what the ABA has proposed or adopted but should use the opportunity to reexamine all of its current rules and decide if those rules accurately reflect the purpose of the Court in regulating the practice of law in the 21st Century and providing the guidance to which the Bar is entitled.

I support following the general format and form of the ABA Model Rules, because doing so makes multi-jurisdictional practice easier. Nevertheless, doing so should not be accomplished at the sacrifice of understanding Michigan's history and precedent in interpreting and applying its rules **(especially in light of the ABA practice of placing compromises in non-binding commentary)** and the additional consequences (in the form of discipline, be it reprimand, suspension or revocation) of applying our rules. I fear that just such a sacrifice has been made in an attempt to mold our rules to a national format.

Although the below discussion includes a good deal of suggested tinkering with the proposed language in both the rules and proposed comments, my broader conclusion is that the proposed rules should be referred to a committee designated by the Supreme Court (and that could be the Ethics Committee) to, this time, make a careful and thorough review of all of the

proposed rules, in light of the history in Michigan of lawyer regulation, the need for better guidance in particular areas, and changes in the foundational needs for such regulations.

Therefore, I have not limited my comments to a few major issues (although my comments include those). By making so many comments (not all of which are of equal importance), there is a risk that those that have the most merit (or most importance) may be lost. The alternative of letting the proposed rules move into effect, leaving stand numerous inconsistencies, ambiguities, outdated propositions, and plain bad policy choices, however, is not acceptable.

As lengthy as my submission is, one person has neither the time nor expertise to fairly address everything that should be addressed. The main point of this submission is not to persuade the Court (or convince anyone, as much as it might be my personal preference to do so) that every recommendation or suggestion be adopted. Instead, I hope to show there are enough legitimate issues to require someone to be assigned to make a thorough report on the proposed rules—a report that explains why changes are proposed or rejected and why existing rules should be retained.

My comments can be broken down into the following categories:

1) Recommendations that certain significant statements found in the current or proposed comments be placed in the rules themselves;

2) Objections to the proposed new language or change from the current rules;

3) Suggestions that rules (whether old or new) be changed or deleted; and

4) Recommended changes in the comments, to the extent that this Court does anything with comments at all.

I will give a few preliminary comments; provide some non-exhaustive illustrations of the four categories, list the rules/comments that are affected by those categories; and, finally, provide a rule-by-rule itemization.

II. Preliminary Comments

In the process of adopting rules and reaching compromise on those rules, the ABA frequently placed compromises in the comments to the rules. In Michigan, however, this Court has made clear that the rules themselves are controlling and that the comments are not authoritative. *Grievance Administrator v Deutch*, 455 Mich 149, 164 (1997). (A more recent illustration can be seen in *In re John F Ervin Testamentary* [sic] *Trust*, unpublished opinion per curiam of the Court of Appeals, decided February 24, 2005 (Docket No. 249974).) Further, this Court applies the "plain meaning" of the rules, as it does with statutes.

Those two fundamental principles clearly are not taken into account by the ABA in its drafting of the ABA Model Rules. Similarly, they were not adequately considered in the recommendations to the Court on adopting those ABA rules. (This issue is not limited to the proposed rules, but is also a problem under the existing rules, which were similarly adopted/modified from earlier versions of the ABA Model Rules.)

Further, underlying my positions is the principle that the Court should reduce lawyer regulation, limiting such regulation to those subjects where regulation is truly needed to protect clients or the integrity of the legal process. Further, where regulation is needed because of legitimate concerns applicable to narrow circumstances, the regulation should be narrowly drafted to apply only to those limited situations, rather than drafted to cast a wide net over situations where such regulation is not needed. The lawyer disciplinary process can then focus on situations that need it, rather than (as currently is the situation) leaving some rules essentially unenforced. If a rule is not important enough to be consistently enforced, then delete the rule rather than create an opportunity for inconsistent enforcement. The mere fact that a rule is not consistently enforced is not a defense to disciplinary action, but it is a clear statement that our enforcement body (the Grievance Commission) does not view the rule as important enough to spend limited funds enforcing the rule. Also, where the logical force of a rule no longer exists (or is a weak remnant), the rule should be deleted or be replaced with a focused rule directed to something important.

A legitimate benefit of nationwide uniformity is not needlessly injured by reducing outdated regulations in Michigan, even if other states insist on retaining similar regulations. If Michigan provides less regulation, "outsiders" need not fear crossing into Michigan's borders and being caught unaware. Michigan lawyers may have to be more careful about investigating the rules elsewhere, but I doubt that Michigan lawyers will complain about that consequence of less regulation in Michigan.

An additional proposition underlying my comments is that, wherever possible, the rules should not impose on a lawyer an obligation to advise someone other than that lawyer's then client (except, at most, informing such person that independent counsel should be consulted), especially where imposing such an obligation could create or worsen actual or potential conflicts of interest. It shouldn't matter that the suggested compelled advice is phrased in terms of merely "explaining" something. The rules appropriately may impose a duty to disclose facts, but, generally, they should not impose a duty to advise or explain to someone other than a current client with respect to the matter being explained.

Also, although this is a narrower proposition, the Rules should incorporate, in the Rules themselves, all substantive standards of conduct used for imposing discipline, including those currently found in other parts of the Court Rules (parts of Chapter 9 of the Court Rules). When a Michigan lawyer faces a questionable situation of professional conduct, she is more likely to consult the Rules of Professional Conduct than the Court Rules. If the standards found in the Court Rules are important enough (and not merely redundant to what is found in the Rules of Professional Conduct) to justify disciplinary proceedings, then those substantive standards of conduct should be placed in the MRPC. Chapter 9 of the Court Rules should be reserved for the

procedural aspects of the disciplinary process, not a substantive trap for the unwary. (The State Bar distributes a copy of the MRPC, not the Court Rules, to all members of the bar.)

Last, these are my personal comments. They do not necessarily reflect the opinions of other lawyers in my law firm (although I agree with the comments submitted by John Allen on behalf of our firm) or clients of the firm. My comments come from the perspective of a lawyer who has not been a solo practitioner or worked in a small firm. I worked as a law clerk for a federal judge, joined a mid-20's size law firm which grew to 150+ lawyers with multi-state (and multiple in-state) offices. I have been an associate, partner, and counsel to that firm. My practice for clients was primarily a business litigation practice, although for 25 years I have participated in advising the firm and its members on issues of professional responsibility. For the last 15 years, that has been one of my primary roles. The firm's practice covers many practice areas, but mainly focuses on civil law. The lawyers with whom I work want to understand the rules that govern their conduct as lawyers. They want to be ethical. They take pride in being lawyers and understand that there are duties and responsibilities imposed by that status that are not imposed on others against whom they compete in the marketplace. They want the rules, however, to make sense in their modern practice of law.

III. Illustrations of Categories

1. Significant Commentary Should Be Placed In the Controlling Rule

As stated above, the ABA's comments have meaning and significance as a place to ameliorate the absolutes of the express terms of a rule. Leaving compromises to the commentary is not harmful in that setting. In any state (such as Michigan) where violation of a rule can result in discipline (revocation, suspension or reprimand), however, comments are not the appropriate place for compromises.

An illustration may make this point best: **Joe Lawyer stops in Emily's Donut Shop (which just happens to be Joe's client) and buys some pastries for his office staff.**

(One could also use the example of a purchase from his client's new car dealership or office supply shop as well).

Both the current and proposed Rule 1.8(a) state that "A lawyer shall not enter a business transaction with a client . . . unless" certain requirements are met. The transaction must be fair and reasonable to the client and transmitted in writing in a manner the client reasonably can be expected to understand; the client must be given a reasonable opportunity to seek advice of independent counsel (in the proposed rule, the client must be so advised in writing); and the client must consent in writing (the proposed rule requires more in the form of consent). Under the plain meaning of the rule itself, **there are no exceptions to these requirements**.

Thus, under the plain meaning of Rule 1.8(a), in the above illustration, Joe Lawyer must give his client (and advise her in writing of this under the new rule) a reasonable opportunity to seek the advice of independent counsel and obtain the client's consent in writing (informed

consent as to the essential terms and disclosing whether the lawyer is representing the client under the proposed rules) before Joe can buy the pastries. This is nonsense, but **that is what the rule itself requires**.

The escape is addressed only in the comments—in both the existing non-binding comment and the proposed comments:

> Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

Existing Comment to 1.8(a). (Essentially the same comment is made to the proposed Rule 1.8(a).) The comment is accurate—there is no reason for the rule in the situation described—but the rule itself contains no such exception. Such a direct contradiction of the plain meaning should not be left to a comment. The exception deserves to be and must be placed in the rule (*i.e.*, put the first sentence quoted above from the comment in the rule itself). Nevertheless, the Ethics Committee made no analysis or suggestion in this regard. Adoption of the proposed rules would perpetuate the nonsense.

I hasten to add that even the exception found in the comment is not broad enough, because it purports to recognize an exception only where the **client** has a business that generally markets its products or services to the public. The same rationale should apply to a lawyer who also owns and operates a donut shop, apart from his law practice, from which the client occasionally buys pastries. Where the product or service is one sold to the general public on the same terms available to the general public, it should not matter whether the seller is the client or the lawyer; the restrictions of 1.8(a) are "unnecessary and impracticable." (By the way, notwithstanding comment [1] to proposed Rule 1.8(a), the same concept could be applied to the sale of title insurance, at least where the purchase of title insurance—like the sale of pizza—arises other than in the course of the lawyer performing legal services for the client.)

Another illustration of the proposition that some elements of the commentary should be moved to the rules can be seen in Rule 4.2 (dealing with communication with a party known to be represented by another lawyer). Indeed, one of the alternatives proposed (for dealing with a "government investigation exception") does precisely that. In addition to the desire of government lawyers not to be restricted by this rule, however, many of the disputes that commonly arise in the context of Rule 4.2 these days do so in addressing its application to individuals who are or were constituents/employees of an organization-client. If the proposed commentary on this aspect accurately reflects this Court's view as to the appropriate limitation placed on such contacts, then the substance of that commentary should be placed in the rule. (I suggest that this scope should be debated further, if the limitation will be included as part of the intended rule itself.)

The comments to proposed Rule 1.7 similarly contain extensive statements about advance waivers and revocation of consent with respect to conflicts of interest. Contrast this placement of important principles in mere non-binding comments with what was done in the area of "former client" conflicts the last time a major change in the rules occurred. Under the Code of Professional Responsibility, no rule directly addressed conflicts with former clients. Instead, over time, principles were developed in applying more general propositions (loyalty, confidentiality, and appearance of impropriety) to the former client's situation. The Model Rules recognized the benefit of placing in the rules themselves provisions that applied—with some modification, certainly—those principles.

Unfortunately, the proposed rules relegate to mere non-binding comments similar principles as to revocation of consent or consent to future conflicts and even a proposed exception in circumstances involving corporate fiduciaries. I submit that such topics are suitable to include in the rules themselves. Michigan lawyers are entitled to know the standards that will govern their conduct—just as they were entitled to know the rules that governed conduct with respect to "former client" conduct. If the comments on these topics reflect the standards that the Court determines should be followed, then the rules should be revised to reflect them. (Or, again, these comments—when placed in the rules—should be the subject of further debate and consideration.)

Rules in which there are statements in the commentary (or other non-binding parts of the proposal) that should be placed in the rules themselves include: 1.0/Preamble/Scope, 1.2, 1.4, 1.7, 1.8(a), 1.10, 1.11, 1.12, 1.14, 1.18, 2.3, 4.2, 4.4, 5.3, 5.7, 8.1, 8.4 and 8.5 (others may see either more or less).

2. <u>Objections to Proposed Language/Changes From Current Rules</u>

The definition and application of "informed consent" (proposed Rule 1.0(e)) raises both policy issues and issues of whether a sufficiently careful review of the proposed rules was made. My emphasis is on the consequence of that definition when applied to rules which require "informed consent" <u>from someone other than a person who is, at the time of such consent, the lawyer's client</u>.

The definition in proposed 1.0(e) requires a lawyer to provide not merely information, but an "explanation reasonably adequate under the circumstances about the material risks of and reasonably available alternatives to the proposed course of conduct." To me, that smacks of giving <u>advice</u> to the person who is giving "informed consent." If that person is not the lawyer's client (and, perhaps, if that person is not the lawyer's client with respect to the matter on which consent is given), however, <u>the lawyer will be giving advice and maybe even giving advice on the very subject about which the lawyer is or may be representing someone adverse to the person giving informed consent</u>. That either creates or exacerbates a conflict by the lawyer.

Whatever might be fairly posited as a need for informed consent from a client, the obligation of a lawyer should merely be to <u>inform</u> (not advise or "explain") and obtain consent from a person who is <u>not then</u> a client (perhaps, with an admonition to consult with independent

counsel). Certainly, the scope of what is needed to be informed consent from a client should not be transported wholesale to the situation of non-clients. Either the definition of informed consent must be changed or a careful review of each rule in which the term is used (the Staff Comment lists seven parts of rules and nine comments) should be made to see if the definition creates more problems than it solves.

Illustration of possible lack of careful review of the proposed rules can be seen in Rule 1.5(b), which contains an internal inconsistency. The proposed rule adds "scope of representation" as something that needs to be communicated to a client early in an engagement. Why, however, is there an exception for communicating such scope of representation merely because the client is being charged a fee at the same basis or rate as regularly charged the client? This suggests that the need to communicate the scope of representation was a mere afterthought. I suggest that the scope of representation communication requirement be deleted (one might also question why the lawyer must communicate that to the client, when that scope may merely reflect a communication from the client) or that an exception for such should be more carefully worded in terms of the communication requirement (*e.g.*, "where the client has communicated the intended scope of representation or the lawyer regularly represents the clients in matters of like kind or acts as a general counsel for a client").

The proposed rules' expanded definition of "tribunal" in Rule 1.0(m) (to include an arbitrator) is troublesome. When applied to Rule 1.16(c)'s requirement that a lawyer must continue representation when ordered to do so by a "tribunal," control of termination of representation is put outside of the control of lawyer, client or court. Although lawyers are subject to the demands of a court, nothing provided in connection with the proposed rules explains why this power should be placed in the hands of an arbitrator (the arbitration may not even require the presence of a lawyer for either side or as the arbitrator). Indeed, the comment for proposed Rule 1.16 only addresses the well established concept that court approval may be needed. I certainly view this as a substantive change in Rule 1.16—even if the Staff Comment does not. Similar concerns exist with respect to the use of the term "tribunal" in 1.10(b)(2) (requiring reporting screening procedures to a tribunal) and 6.2 (accepting appointments from a tribunal), and even 8.5 (choice of law for conduct in connection with a matter before a tribunal).

A more substantive issue having broader impact is the proposed requirement of consent "confirmed in writing". See proposed Rule 1.7(b)(4). Others have commented on the drastic effect that can have (creating a technical violation, in a situation where actual consent is conceded, which violation might result in discipline including a suspension). I suggest below an alternative—one that encourages consent confirmed in writing but without the automatic violation consequence of not having such. That is, perhaps provide a higher standard of proof (clear and convincing?) to someone asserting a consent not confirmed in writing. Or even provide a "safe haven" allowing a lawyer to act in reliance on a consent confirmed in writing within a reasonable time—at least until such a consent is expressly repudiated. One version of this concept is actually found in proposed comment [1] to proposed 1.0. At most, create a rule (somewhat analogous to MCR 2.507(H)) such that there is no violation unless consent is subsequently denied as having been given. That is a better way to encourage written

confirmations, without creating rules that create "technical" violations where no harm has been caused.

Rules in which the proposed changes are objectionable include: 1.0/Preamble/Scope, 1.02, 1.2, 1.4, 1.5, 1.6, 1.7, 1.8(a), 1.8(b), 1.8(g), 1.8(j), 1.8(k), 1.9, 1.10, 1.11, 1.12, 1.13, 1.15, 1.16, 1.18, 2.2 (deleted old rule), 2.3, 2.4, 3.4, 4.2, 4.3, 4.4, 5.4, 5.5, 5.6, 5.7, 6.1, 6.2, 6.3, 6.5, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 8.1, 8.2, and 8.5.

3. Change or Delete the Rule (Old or New) in Whole or in Part

In general, my comments under this heading are not a criticism of the thoroughness of review of the ABA proposal. Instead, my belief is that no thought was given (as part of the consideration of adopting those rules in Michigan) as to whether to: correct or clarify existing ambiguous language; retain language or provisions that do not have sufficient justification to retain; or redraft provisions to address merely the focused justifications that may exist for a rule. (This category sometimes overlaps with my first category—where a comment deserves to be in a rule.)

One example of a rule that should have been modified but which was not (in this regard) is Rule 1.9—the former client conflict/confidentiality rule. The current and proposed rule both fail to recognize the two kinds of conflicts that arise in current client conflicts and phrase the former client conflicts rule to address the only one that is truly relevant to a former client situation. That is, Rule 1.9(a) and (b)(1) (current and proposed) speak of a situation in which a current client's interests are "materially adverse" to the interests of a former client. This "materially adverse" requirement, however, should expressly incorporate the "directly adverse" requirement found in part of Rule 1.7(a)(1) in the proposed rule (and current Rule 1.7(a)), as distinguished from representation that merely may be limited by responsibilities to another (1.7(a)(2) in the proposed rule and 1.7(b) in the current rule). This would avoid mischief created by someone asserting that representation is "materially adverse" to a former client, although not "directly adverse" to that former client.

For current clients, it is understood that, under proposed 1.7(a)(2), the only consent needed – where clients are not directly adverse - is from the client the lawyer is representing in the matter, not from the other current client. The fact that someone has become a former client should not increase the obligation to obtain consent in such a situation. (Perhaps, this "directly adverse" requirement is understood to be a necessary part of any representation that is "materially adverse," but that is just the kind of potential ambiguity that should not be left for later decision, when it can be easily clarified in the rule itself.) Rule 1.9(a) and (b)(1) should require the representation to be "directly and materially adverse."

Another example is the use of "the" to refer to "the state" where the lawyer's office is situated" in (current and proposed) Rule 1.15(a)'s requirement as to where funds of clients or others are to be held. Did anyone give any thought to lawyers/firms with multiple offices in multiple states? I am unaware of any substantial justification (other than each state's parochial insistence that only it can protect clients) for not providing that the funds be deposited in such an

account in "any state where the lawyer's office or any other office of the law firm in which the lawyer is associated is located." In light of Supreme Court precedent on the meaning of "the," this is an example of careless drafting or review. *Massey v Mandell*, 462 Mich 375, 382 (2000).

Rule 1.16(d) also deserves a clarification as to what a lawyer needs to provide to a client at termination. Although this may be asserted to be an issue of law, not ethics, it is an issue that can repeatedly arise—and involves a duty which the AGC repeatedly includes in complaints for discipline. As a result, the **ethical** obligation ought to be made clearer and, for purposes of discipline, the categories of what does and what does not have to be provided listed.

John Allen's submission includes a proposed addition to Rule 1.4 that would address this topic, consistent with Michigan law covering other professionals. The client should have access to most papers or property created or obtained in the representation and should have a right to possession of some originals. I agree with the substantive provision in Mr. Allen's submission, regardless of where the provision is placed. I discuss this in the context of Rule 1.16, because the issue commonly arises at (or after) termination of an engagement. (I will come back to this topic, below, in discussing Rule 1.16, and will address a counter-proposal made by four university general counsel.)

Rule 5.6(a) (prohibiting restrictions on practice after termination of a relationship with a law partnership, corporation or firm) should be deleted in its entirety or narrowly redrafted to address any legitimate concerns. That is, the ethical force behind 5.6(a) has been destroyed by Rule 1.17 (sale of all or part of a law practice) and the generally accepted fact that there is no shortage of lawyers in Michigan. Simple fairness requires that law firms be permitted to protect themselves as much as a buyer of a law practice. Maybe some compromise language is possible (as I discuss in the context of the rule) but, in general, if someone asserts that there remain circumstances in which clients will be materially limited in their choices of counsel, let that person support that assertion and propose a rule that focuses on those situations (circumstances in which, presumably, the same material limitation would not arise by reason of the sale of a law practice). Michigan has general law applicable to covenants not to compete. The restrictions imposed by that general law should be sufficient.

Also, the Court should take this opportunity to reexamine and rewrite the rules applicable to advertising and solicitation by lawyers. The existing rules and the proposed rules are mostly remnants of long discarded principles that lawyers are "above" such things. The AGC routinely (but not entirely) ignores continuing violations of the existing rules. (A regulator of this topic could quickly become overwhelmed, if the regulator merely watched daytime television ads, picked up a copy of a "yellow pages" directory for a metropolitan area or, perhaps, even just read the inside cover of the Bar's own Journal and compared the advertisements to the strict interpretations of the existing rules.) Undoubtedly, there are aspects of solicitation and advertising that can be regulated consistent with the First Amendment (where advantage may be taken of an unsophisticated client at a moment of extreme vulnerability), but the rules should be redrafted more narrowly to attack those real problems.

As to solicitation, where a lawyer solicits, in person, the CEO of Ford Motor Company to engage that lawyer for a particular legal matter, there is no significant risk that the lawyer will take unfair advantage of that CEO. It may be annoying, but currently permitted direct mail solicitation can be annoying. Similarly, nothing should prohibit Joe Lawyer from standing up at a local chamber of commerce (or some other business association) and "pitching" his own abilities to assist other members of that association for business. That is "in person" solicitation, but the dangers that might justify our Rule 7.3 simply don't exist in that setting.

Likewise, if the goal is to prevent a lawyer from hiring a "runner" to disguise himself as a priest and solicit injured victims or family members as clients at the scene of an airplane crash, then narrowly draft a rule to do so—don't preclude a lawyer from following what is a universally accepted (and maybe even anticipated and expected) ethical business practice of providing some minor after-the-fact "thank you" nominal gift to another professional who referred or recommended the lawyer's services to a potential business client for a matter that turned out to be hugely profitable for the lawyer. I suspect that the current rule is one that is massively ignored (in its absolute nature of not being able to provide "anything of value") and almost never enforced—except for the unfortunate lawyer who is brought to the attention of the AGC for something else. Those who try to comply with the current rule should be freed from its absolute constraints and a more focused rule drafted, if one is to be retained at all.

Rules that fall within this category of my comments include: 1.5, 1.8(a), 1.8(e), 1.8(f), 1.8(i), 1.9, 1.10, 1.11, 1.12, 1.13, 1.15, 1.16, 2.3, 2.4, 3.4, 3.6, 3.7, 4.2, 5.3, 5.4, 5.5, 5.6, 6.3, 7.1, 7.2, 7.3, 7.4, 7.5, 8.1, 8.2, 8.3, 8.4, 8.5

4. Changes to Comments, If the Comments Are to Be of Any Use

As discussed above, comments are not binding (and, thus, should not contradict the plain meaning of the rule itself or contain an essential part of the rule), but the comments can be helpful in understanding how a rule might be applied.

With that limited role in mind, there are some comments that should be changed. Some suggestions on the wording of comments simply track suggestions as to the wording of a corresponding rule. In addition, however, there are some circumstances in which the rule and comment are not in agreement. If the rule is correct, the comment should be deleted or modified. (A different category is where the comment is correct; then the rule should be changed.)

In addition, some erroneous commentary appears to have "slipped through the cracks" in adapting the ABA's comments to Michigan rules which are not identical to the ABA Model Rules. In other situations, the ABA's comments themselves may not have been appropriate or there should be further comment to be useful.

An example of an inappropriate comment can be seen in comment [8] to proposed Rule 1.2, which comment implies that a lawyer's fee agreement with a client (something clearly falling within the phrase "all agreements concerning a lawyer's representation of a client") must meet the requirements of proposed Rule 1.8 (including, presumably, 1.8(a)'s requirements for a

business transaction with a client). In contrast, comment [1] to proposed Rule 1.8 states that 1.8(a) does not apply to ordinary fee agreements between lawyer and client, which agreements are governed by Rule 1.5. The inconsistency should not be left uncorrected. Comment [8] to proposed 1.2 should be deleted.

Inconsistencies also arise where the ABA comments have been altered. Thus, comment [1] to proposed 1.8 states: "**The Rule applies** to lawyers engaged in the sale of goods or services related to the practice of law, for example the sale of title insurance or investment services to existing clients for the lawyer's legal practice. See Rule 5.7." On the other hand, comment [5] to proposed Rule 5.7 (which is different from the ABA's comment) states: "When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related entity controlled by the lawyer, individually or with others, the lawyer who complies with Rule 5.7 is **not required to comply with Rule 1.8(a)**." (Emphasis added.) These comments cannot both be accurate!

A different kind of problem is comment [14] to proposed Rule 1.7, which adopts a common description of the conflict waiver process (that a lawyer "cannot even ask for such agreement"), but the description has no support in the rule itself. (The current comment to the current rule contains the same error.) Neither the existing rule nor the proposed rule purport to prohibit a lawyer from requesting consent to an unwaivable conflict—the rule merely makes the consent unenforceable. The comment should be deleted.

Comment [18] to proposed Rule 1.7 contains a statement that information provided to potential clients in multiple representation situations "must include . . . the advantages" of the multiple representation. Although, as a practical matter, lawyers may wish to include a statement of such advantages (and the comment could approve doing so), there is no good reason why omitting the advantages should adversely affect the validity of consent obtained when only the risks and disadvantages were disclosed. (Requiring discussion of advantages is probably a result of current 1.7's phrasing. That, however, is removed from the proposed rule and should be similarly removed from the comment.)

Rules that have comments falling within this category include: 1.2, 1.4, 1.5, 1.6, 1.7, 1.8(a), 1.9, 1.10, 1.11, 1.12, 1.14, 1.18, 2.4, 3.3, 4.2, 5.7, 7.1, 7.2, 7.3, 7.4, 7.5, 8.2, 8.4 and 8.5.

IV. Rule by Rule Discussion

1.0 /Preamble/1.01/1.02

A. The rules should be separate from and not intertwined with claims for damages. Thus, I concur in the observations by Mr. Brooks, Ms. Proctor, Mr. Allen, and Ms. McAllister, as to clarifying that alleged violations of the rules are not to be used to support claims for civil damages. In addition to the current language in proposed Rule 1.02, the text also should state that violation of the rules shall not be admissible (as evidence or a presumption) in a civil action for damages. Consistent with this, the first sentence of [20] of the proposed Preamble should delete the word "itself," so that it will read: "Violation of a Rule does not give rise to a cause of action against a lawyer nor does it create any presumption in such a case that a legal duty has been breached." Similarly, the last sentence of [20] of the Preamble (which permits violation of a rule to be evidence of breach of a standard of conduct) should be deleted. The standard is what a lawyer of ordinary learning, judgment or skill would or would not do under the same or similar circumstances, not what a code or rule prescribes in the abstract. *See*, M Civ JI 30.01.

Mr. Kemsley has made a contrary recommendation. I cannot respond to all of his points, because he asked the Court to review briefs filed under seal in pending matters, which briefs (because they are under seal) are unavailable to the public. My impression, however, is that his position is driven mostly by his belief that an inability to pursue a lawyer for breach of fiduciary duty (based on violation of the MRPC) would make law firms immune from liability for breach of fiduciary duty. Excluding use of the MRPC as the basis for such a claim, however, would do no such thing. Fiduciary duties would remain as a matter of common law, and civil actions would remain for conduct breaching a duty to a client. These rules, however, are not drafted with that concern in mind and should not be misused for such a purpose.

On the other hand, if the rules are to be used in such a fashion, they should be drafted and reviewed with that purpose in mind. (Thus, to whom is a lawyer/law firm liable for violating proposed Rule 3.7(a)? Are Rules 1.18, 4.3, 6.2, and 6.6 intended to break with Michigan's well established elements for a malpractice claim? Is Rule 2.4 to be a foundation for suits against lawyers serving as third party neutrals? Will Rule 3.1 and 3.4(d) serve as the basis for (outside of a sanctions motion) a private cause of action, not limited by the elements established for malicious prosecution/abuse of process actions? Will Rule 3.2 provide a damage remedy against the other side's lawyer who has sought an extension of time? Are violations of Rules 7.1-7.3 to be used to recover damages by offended recipients of lawyer advertising?)

B. Proposed comment [1] to 1.0 states, in part: "If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter." **I recommend that this statement be put into a rule or rules**. As an alternative to a requirement that something be "confirmed in writing," this concept also could be put into each proposed rule that, as currently proposed, uses the concept of "informed consent confirmed in writing." This concept would encourage written confirmation but avoids creating technical violations for conduct which causes no harm. See, *e.g.*, my discussion of Rule 1.7.

C. My principal concern with "informed consent" (proposed 1.0(e) in the proposed rule) arises from the contexts in which this is required. Because "informed consent" includes a requirement that a lawyer give an explanation about material risks and alternatives, a lawyer should not be required to do so other than to a then existing client. Therefore, the comments to Rule 1.0 on informed consent ([6], [7]) should delete the multiple references to "or other person(s)" (including a former client or prospective client).

D. The comments for 1.0, in [9], as to "screening" should not provide that others who are working on a matter "may not communicate with" the screened lawyer. The purpose of screening is to prohibit communication from the screened lawyer on the subject of the screened matter and that lawyer's participation in the screened matter, not communication to the screened lawyer or that lawyer's access to information the firm already possesses. The rule itself correctly identifies the issue as being protecting information that the screened lawyer already has, not whether the screened lawyer might obtain more information from the new firm. At most, the comment could provide that other lawyers in the firm "may not obtain information from" the screened lawyer. Similarly, the portion of that same comment [9], providing that the screened lawyer not have "contact with" files or materials relating to the matter should be deleted, because that is not the problem being addressed.

E. Above (in III.2.), I mentioned a problem with the proposed definition of "tribunal." It is unwise to place control over withdrawal of a lawyer (Rule 1.16) in the discretion of an arbitrator—someone (who need have no experience in the law or ethics of law) without inherent authority over that issue, except as it may be provided by reason of these rules. Similarly, it should not be necessary to report screening procedures (1.10(b)(2)) to an arbitrator or not avoid appointments by an arbitrator (6.2). See also my discussion of Rule 8.5.

F. The rules do not provide a definition of what makes a communication "*ex parte*," although at least two of the rules reference an "*ex parte*" communication or proceeding (3.3(d), 3.5(b)). The scope of what is or is not "*ex parte*" should be clarified, and that can be done in the definitional section (or in each rule). One might think that a dictionary definition ("from one side only") would suffice, but a common dispute concerns substantive written communication to a judge, copied to the other parties, but with no express opportunity to respond before the judge might act on the communication. (The earlier Code of Professional Conduct expressly permitted communication with a judge in writing if the lawyer promptly delivered a copy of the writing to the opposing side. DR-7.110.)

RI-243 (10/5/1995) doesn't treat a letter to the judge as an *ex parte* communication, although it opines that such a letter is improper because it aids violation of the Code of Judicial Conduct and is unauthorized by any court rule. On the other hand, such a letter is clearly "from one side only" and there are Michigan Court of Appeals opinions that deem such a communication to be *ex parte*. *Nowakowski v Hughes*, unpublished opinion per curiam of the Court of Appeals, decided 5/26/2000 (Docket No. 211406) (recognizing that "counsel engaged in ex parte communications by sending a letter to the judge . . ."); *Donaldson v Donaldson*, unpublished opinion per curiam of the Court of Appeals, decided 9/16/2003 (Docket

No. 241063) (communications to the court without the other party being informed "thereby precluding a direct response to the communication," treated as *ex parte).*

I submit that such a communication is *ex parte,* unless nothing is being requested of the judge until after the opposing party has had notice of the communication and is given an express opportunity to respond or object. Would anyone really doubt that a telephone call to a judge to discuss the merits of a substantive motion was *ex parte*, despite the lawyer linking in the opponent's answering machine/voice mail, so that the conversation was fully recorded? Or sending the opponent a transcript? The test is not whether there is a record or whether there is some notice of the communication; the test should be whether there is a known opportunity to respond or object before the judge will take action. *See*, 3 Restatement Torts, 2d, § 674, comment h ("Proceedings are ex parte when relief is granted without an opportunity for the person against whom the relief is sought to be heard").

Thus, I propose that the rule provide as a definition of *ex parte*:

> An *ex parte* communication is any communication, in a pending matter, as to which other parties/lawyers are not expressly provided both notice and a reasonable opportunity to respond or object to the communication. This includes written correspondence directed to a judge, whether or not an opposing party/lawyer is copied on the correspondence, unless there is expressly provided a reasonable opportunity for the opposing lawyer/party to respond in kind or object. An *ex parte* proceeding is a proceeding in which *ex parte* communications occur.

This definition would not prohibit or condemn *ex parte* communications or proceedings; it merely identifies what makes something *ex parte*. Individual rules such as 3.5 would still permit *ex parte* communications, if authorized by law or court order. And 3.3 would continue to impose certain obligations on a lawyer in an *ex parte* proceeding.

G. Several rules use the undefined phrase "apportioned no part of the fee," although comments explain the phrase. I suggest that the description be added to 1.01.

1.2.

A. Michigan previously rejected language in proposed Rule 1.2 as to an obligation to consult with respect to the "means" of meeting the client's objectives. That obligation was in the then ABA Model Rules when Michigan previously adopted a form of those rules—and Michigan chose not to include such language in Rule 1.2. No justification has been presented for reversing that earlier rejection. I am not aware of a problem that has arisen in Michigan over this issue. This appears to be an example of fixing a rule that does not need fixing.

An obligation to consult with a client "as to the means" is simply too vague to be of assistance. The comments cannot be relied upon to provide adequate guidance, because the rule itself does not impose a limitation on its scope. This rule also has the potential for escalating the cost to clients (by requiring unnecessary consultations), although that effect could be reduced if the substance of comment [3] (re advance authorization to omit further consultation) were placed in the rule.

B. The addition of 1.2(c) (placing a restriction on limiting objectives of representation) moves the rules in the wrong direction—the rules should be moving toward greater freedom of contract with sophisticated clients, not less. Compare proposed Rule 1.8(h)(1) (allowing prospective limitation of malpractice liability if the client is independently represented).

Furthermore, this is an example of where "informed consent" (as defined in these proposed rules), rather than consent, is not appropriate, because this consent may well come as a condition for the lawyer undertaking the representation. That is, the "client" may not even be a "client" but for (and after) the limitation is included as part of the engagement agreement. As discussed above, the "informed consent' requirement should only apply to consents between someone who—at the time of such consent—is a client, not someone who will become a client as a result of the informed consent. Consent and fair disclosure should be sufficient. In the alternative, if a "reasonableness" limitation is to be included in the rule, the existence of independent representation of the client with respect to such consent should be conclusive as to reasonableness.

C. Comment [8] should be modified. An agreement as to the very engagement of the lawyer should not be subject to Rule 1.8. 1.8 should address agreements with someone who is already a client, not the agreement by which the client becomes a client.

D. Comment [11] (lawyer for a fiduciary "may" be charged with special obligations in dealing with a beneficiary) should be deleted as embodying a comment on law rather than ethics. Furthermore, the legal principle (although stated only as a possibility) appears to be contrary to established Michigan law. *See*, *In re Powell*, 160 Mich App 704 (1987); *In re Makarawicz*, 204 Mich App 369 (1994).

E. Contrary to Ms. Proctor's observation, I think the change from "illegal" to "criminal" is warranted in this rule. The concept of what is "criminal" is firmer than what is "illegal." Use of the term "illegal" in the context of what a lawyer cannot do becomes a trap.

F. See also my discussion of proposed Rule 4.4, with respect to receipt of inadvertently sent materials.

1.4

A. As to proposed 1.4(a)(2) and corresponding comment [3], I question the need to consult with clients about the means to be used by the lawyer. See my suggestions as to proposal 1.2, above. As mentioned there, the proposed rule creates a potential minefield for disputes over just how detailed that discussion ("reasonably consult") should be. It may not even be to the client's benefit that the lawyer is forced to undertake that discussion (and, presumably, bill the client for that time, if the fees are charged on an hourly basis). Clients and lawyers should be able to contract for the lawyer to move toward a goal, without the necessity for detailed discussion of the particular means used by the lawyer. This concern could be ameliorated somewhat by placing the statement in comment [3] to Rule 1.2 also in the text of Rule 1.4(a)(2).

B. John Allen has proposed an additional subpart of 1.4, addressing ownership of files and recordkeeping. I support the substance of that proposal, the subject of which I discuss below in connection with Rule 1.16 and above in Part III.3.

C. See also my discussion of proposed Rule 4.4 regarding receipt of inadvertently sent materials.

1.5

A. As previously discussed (Part III.2), proposed Rule 1.5(b) is internally inconsistent. I suggest that either the scope of representation addition be deleted or the exception for that requirement be phrased in terms that are relevant to that exception (e.g., "where the lawyer regularly represents the clients in matters of like kind or acts as general counsel for a client").

B. Proposed Rule 1.5(c) suffers from the problem (also found in the current rule) of there being no definition of what makes a fee agreement "contingent." The rule should clarify precisely what kind of contingency it does cover and what it does not cover. Does it apply to fees that are "partly" contingent (a low hourly rate plus a contingent bonus)? Does it apply to all fee agreements that are "partly" contingent? 1.5(a)(4) (old or new) states that a factor in determining reasonableness of a fee includes "results obtained." If a lawyer sets his fee on the basis of all of the factors in 1.5(a)(4), does that make the fee at least partly "contingent"?

The draftsmen also improperly focused only on litigation contingencies, although the rule is not expressly limited to contingent claims which may be litigated. Why should a "business transaction contingency" fee agreement be required to include "the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal"? If, on the other hand, the rule is intended to only apply to litigation (in whatever forum) contingencies, then the rule should state that expressly.

C. I disagree with Ms. Proctor's comment that the limitations on personal injury/wrongful death contingent fees (found in parts of MCR 8.121) should be standardized for all contingent fees. Standardization for the mere sake of standardization is not a sufficient reason to expand the limitations beyond where they currently apply.

D. Is the deletion of the cross reference to MCR 8.121 intended to remove violation of the court rule as a basis for discipline? If so, fine, but I think a cross reference should be retained in the comments. If someone from out of state does not know about 8.121 and reads the ethics rule (which is easier to locate because it is numbered in accordance with the ABA Model Rules), the commentary should direct the reader to MCR 8.121.

E. I concur in Ms. Proctor's observations on the relative merit of the current and proposed Rule 1.5(e) (sharing fees with a lawyer not in the same firm). What is important is that the client be notified, not which lawyer provides that notification. Is it really asserted that discipline would be appropriate where 1.5(e) was fully met except for the fact that the client was notified by the "wrong" lawyer? I think not. Ms. Proctor is also correct in her explanation as to why non-objection, rather than signed consent, should remain the rule in Michigan. (As a practical example, consider a lawyer representing hundreds of common clients in a single litigation matter which—for whatever reason—does not qualify as a class action. Depending on the lawyer's resources, she may find that she needs assistance from another lawyer or firm, after commencing the representation (and having signed contingent fee agreements). Obtaining

individual "consents" can be very impractical, although providing notice and the opportunity to object may be manageable.)

F. I concur in Ms. McAllister's comments about eliminating Rule 1.5(f)(4) with respect to non-refundable fees. Keep in mind that the prohibition of a clearly excessive fee would still be in place, although 1.5(a) might need to be modified to add "retain" to the listed prohibited conduct. ("A lawyer shall not make an agreement for, charge, collect or retain an illegal or clearly excessive fee . . ."). See also my comments as to proposed Rule 1.15(c). My suggestion might also address Judge Brown's suggestion that 1.5(f)(4) add an express reference to the unrefundable fee not being "clearly excessive." Although I don't think it would be necessary, if 1.5(a) were modified as I suggest, it might be helpful to replace currently proposed 1.5(f)(4) with <u>just</u> the condition that the fee not be clearly excessive.

I do not agree with Judge Brown's implicit hypothesis that a fee is only "earned" based on expended time and effort. The point of 1.5(f) is to make it clear that is <u>not</u> true. Moreover, Judge Brown's comment fails to recognize the significance of how a non-refundable fee is held by the lawyer until there is some reason to believe that the fee has become "clearly excessive". See my comments on Rule 1.15.

G. I suggest deleting the last sentence in comment [4]. If a client is not yet a client (because the client does not become a client <u>until</u> the engagement agreement exists), then an initial fee agreement should <u>not</u> be subject to 1.8(a). I would go further, however, and provide that, even for an existing client, all limitations on the fee agreement should be found in 1.5, not part in 1.5 and part in 1.8(a). When an existing client is involved, the issue of the lawyer taking unfair advantage remains a legitimate one, but it should be tested under the standard of a "clearly excessive fee"—not the standard for a business transaction with a client.

1.6

A. The proposed rule is both too broad and too narrow. Mr. Hammond's submission pointed out that the proposed rule may decrease confidentiality in some respects, and his point is a valid one, as to information which may not "relate to the representation of a client" but is, nevertheless, acquired in the course of the representation. On the other hand, proposed 1.6 also increases the confidentiality obligation beyond what is needed to fairly protect a client's legitimate interests.

Michigan previously declined to take the approach in the ABA Model Rule, instead retaining a scope of confidentiality which had its foundation in the prior Code of Professional Responsibility. The existing scope of confidentiality is broad enough to protect clients, yet it gives lawyers some leeway as to information that is not privileged, the client has not requested be held confidential, is not embarrassing to the client, and is not harmful to the client. Many times, there will be no difference in how information will be treated under the current and proposed rules. As a practical matter, however, the current wording is helpful in analyzing what can be done in situations where a client cannot be contacted. This is an area where deference to the ABA Model Rule is not appropriate.

B. In proposed 1.6(b)(2), the use of "illegal" rather than "criminal" is consistent with Michigan's existing rules, although the proposed rules change "illegal" to "criminal" elsewhere. I support the use of "illegal" in proposed Rule 1.6(b)(2), because the rule is not imposing a duty on a lawyer. The lawyer has discretion to reveal confidential information, if the client used the lawyer's services to further an illegal act. Comment [6b], however, purports to relate this to Rule 1.2(d), referencing terminology in Michigan's current Rule 1.2 (which uses the term "illegal"), not the proposed Rule 1.2(d) (which applies to aiding criminal acts, not merely illegal acts). The comment should be changed.

C. The third sentence in proposed comment [6d] (referencing the comment to Rule 1.2(d)) should be deleted and the second sentence in that same comment should not include an "except in . . ." clause. The second sentence should say simply: "Inaction by the lawyer is not a violation of Rule 1.2(d)." There are **no** "limited circumstances" discussed in the comments to proposed Rule 1.2(d) identifying where a failure to act constitutes assisting the client—unless this is meant to reference comment [11] to 1.2(d) (concerning fiduciary clients), which comment I have recommended be removed as contrary to Michigan law. The objectionable proposed statement also is inconsistent with the later comment in [6f] that a lawyer's decision not to make a disclosure permitted by (b) does not violate this rule.

D. Comment [8] should not be limited to responding to complicity in "a client's conduct." The rule itself is not so limited. The phrase "a client's" should be changed to "another's." The existing principle is that a lawyer can defend himself from assertions of complicity in wrongful conduct, whether or not the alleged wrongful conduct was that of a client. If my suggested change were adopted, the second sentence of this comment (extending the concept to a former client) can be deleted as redundant.

1.7

A. The State Bar's Representative Assembly reasonably recommended rejection of the "confirmed in writing" requirement. I concur, as have others. There is no misconduct where it is fairly concluded that consent was given—only not confirmed in writing. Encouragement of written confirmation can also be achieved by protecting reliance on such consents. See F, below. As discussed above, an alternative of a higher burden of proof or an MCR 2.507(H) "statute of frauds" could be used.

B. Where consent is required, consent should be valid if the person giving that consent consulted with **another** (independent) lawyer about giving consent. The lawyer involved in the potential conflict situation should then be absolved from engaging in any further "explanation" of risks and alternatives. Factual disclosure should be sufficient. In essence, this would revise and move the substance of comment [22]'s statements dealing with situations where the client has other counsel. One possibility is:

> The condition in 1.7(b)(1) will be conclusively deemed to have been met, if the client is independently represented by other counsel in giving consent and such consent (for present or future conflicts) is confirmed in writing.

C. Further, as stated above, my general recommendation is that a lawyer only be required to "explain" things to an existing client. In such a situation, imposing a duty to explain is not causing a lawyer to give advice to someone who is not, at that time, the lawyer's client.

In addition, I suggest eliminating a duty of "advice" (*i.e.*, explanation*)* to someone who is not the lawyer's client in the matter in which there is the potential conflict. In such a situation, the lawyer should, instead, have a duty to inform the client (not being represented by the lawyer in the matter) of the actual or potential conflict. The rule might even impose a duty to inform that this client should seek advice from independent counsel, if the client is not represented in the matter. Imposing a duty to advise the very client against whom the lawyer is representing someone else, however, exacerbates the conflict that may exist, for then a duty has been imposed to advise both sides in a matter in which the lawyer has a conflict.

Thus, with respect to obtaining consent, a lawyer in a 1.7(a)(1) situation should only be advising the client the lawyer will represent in the matter. The duty to the other client (in addition to the other requirements of 1.7(b)(1)-(3)) should only be to disclose the circumstance (so that such client reasonably knows that the lawyer is not protecting that client's interest in the matter) and (perhaps) to disclose that the other client should consult with independent counsel.

D. Proposed Rule 1.7(b)(4) should have a better explanation **in the rule itself** as to who is an "affected client" required to give informed consent in the (a)(2) situation. The comments reveal that the draftsmen believed that, in the (a)(2) situation, **only the client being represented in the matter by the lawyer** is really an "affected client." See comment [2], last sentence. I agree. The rule's requirement that consent must come from "each affected" client, however, is subject to a misinterpretation that **both** clients in an (a)(2) situation may be

"affected," although one of them is only "indirectly" affected. Rejection of that proposition should be in the rule, not merely in a nonbinding comment. (At a minimum, comment [18]'s use of the phrase "each affected client" should be clarified so that phrase is understood "(as described in comment [2]) . . . .")

E. The current and proposed rules both are woefully lacking any express provision for how to address an attempt to resolve a "current client" conflict by making one of the clients a former client. Although many courts have adopted a "hot potato" doctrine (and exceptions), that doctrine has no basis in the text of the conflict rules. (It may have, at one time, had a basis in the "appearance of impropriety" standard that has been rejected in the rules for almost 20 years.) It is time that this Court addressed this and made a clear statement in the rules as to what is and is not permitted.

In that regard, comment [5] to proposed 1.7 contains some guidance, which is sufficiently valuable to have the principle placed in the rule itself—that the lawyer may have the option to withdraw from one of the representations in order to "resolve" the conflict. Indeed, both aspects of this issue—when a lawyer can do so and when a lawyer cannot do so—are sufficiently important that they should be addressed in the rule itself, if any standard is to be applied for withdrawal other than those found in Rule 1.16. I expect that there may be substantial debate on those points.

F. The subject covered in proposed comment [21]—revoking consent—is also of sufficient importance to be **in the rule itself**. The rule, however, should **not** be left to "contract law" (as might be drawn from the third sentence in comment [21]), because the issue here is whether the lawyer is violating these ethical rules, not whether the client or lawyer has a claim for breach of contract or can specifically enforce a contract. Instead, the following should be added to the rule: "A lawyer may reasonably rely on a consent confirmed in writing, such that a client's revocation of such a consent will not result in the lawyer being prohibited from continued representation of another client." This would have the dual advantage of **encouraging** written confirmation of consent and respecting the necessity of reliance on consents.

G. The subject of comment [22] ("future consent") should also be covered **in the rule itself**. One possible addition would be:

> A client may consent to conflicts that might arise in the future, subject to the tests of paragraph (b), provided that the tests in (b) are to be applied as of the time consent is given. Notwithstanding such consent, if future circumstances are such that the consent would not be valid under (b) at the time the future conflict actually arises, the client is free to terminate the lawyer's representation of that client and revoke the consent to that extent.

The effect of such a revocation would be as provided in my suggestion in F. above.

H. Proposed comment [22]'s statements about experienced users of legal services should be revised and made part of the rule itself. That is, the rule should have a provision that says:

> If the client is an experienced user of legal services and is reasonably informed regarding the risk that a conflict may arise, the burden of proof lies on any party challenging the validity of the consent.

I. Proposed comment [3], first sentence, incorrectly states that the lawyer must obtain the consent of "each client" under the conditions of (b). The rule is for the consent of each **affected** client, not each client. The comment should be amended to be consistent with the rule.

J. Proposed comment [6]'s illustration of cross-examining a client as a witness is too broad. (Admittedly, the language used is that a direct conflict "may arise" in such a situation, but the conditional aspect likely will be ignored.) If a client/witness has no personal stake in the litigation other than as a witness, that client should **not** be considered to be "directly adverse" to the client the lawyer represents in cross examining the witness. The only one who should have to consent in that situation is the client the lawyer is representing in that particular matter. (The situation of an expert witness who is cross examined on the basis of lack of expertise would be a special situation where the witness does have a stake in the cross examination.)

K. Proposed comment [14] accurately states a proposition found in many ethics opinions and treatises, but it is unsupported by the rule itself (current or proposed). The second sentence should delete the phrase "ask for such agreement or . . . ." Nothing in the rule supports the proposition that a lawyer cannot ask for a consent which the lawyer ultimately determines she cannot enforce. The rule only says that the lawyer cannot enforce such a consent by representing a client in such a situation (". . . a lawyer may represent a client if . . ."). As a practical matter, inquiry may be made as to whether a client would consent at the same time the lawyer researches or considers whether the circumstance is one in which consent is sufficient. This frequently recited—but totally unsupported by rule—statement should be rejected and deleted.

L. Comment [18] includes the suggestion that information given to the client in obtaining an informed consent "must include" the "advantages" as well as the risks involved. Although it would be helpful to state that the information "may" include the advantages—so as to give comfort to lawyers that do include such advantages—it is hard to justify a conclusion that, where a client consents to common representation after having been told of the risks (but not the advantages) of such representation, the client should be allowed later to challenge the consent because the client was not adequately informed of the advantages.

This same objection to the treatment of "advantages" is applicable to similar treatment in comment [20]. There is simply nothing in the rule itself to support the comment.

For the same reason, in comment [22], reference to "and benefits" of the consent can be eliminated. The comment could say that a lawyer may explain the benefits—but the test of validity should be whether the client understands the material risks.

(Note that the current Rule 1.7 states that consultation concerning representation of multiple clients shall include explanation of the advantages. There is, however, no good reason for requiring—rather than permitting—that.)

M. In comment [22], I suggest deleting the sentence that begins "On the other hand . . . ." It is inaccurate to state that an unsophisticated client ordinarily should not be able to consent to future conflicts. The statement is condescending and unsupported by any empirical evidence of which I am aware.

N. The last sentence in proposed comment [22] should be deleted. A change in circumstances should permit revocation of consent and termination of the representation of that client (with the consequences described above), but it should not be suggested that the advance consent was not otherwise "effective."

O. The substance of proposed comment [36] should be placed **in the rule** if the comment's sentiments accurately reflect the Court's intention. *See, In re John F Irvin Testamentary* [sic] *Trust*, unpublished opinion per curiam of the Court of Appeals, decided February 24, 2005 (Docket No. 249974). The last sentence of the comment could be easily modified to serve that purpose.

Although the Michigan Banker's Association Trust Executive Committee disagrees with the full extent of the proposal (which was initiated by the Probate and Estate Planning Council), the Committee apparently recognizes the reasonableness of a narrower exception. The Council's proposal, however, clearly made its suggested exception the default resolution "in the absence of a contrary agreement." Thus, a corporate fiduciary would remain free to protect itself from the situations described by the Committee merely by including, in its agreement engaging a lawyer, a provision that the lawyer not represent clients adverse to the corporate fiduciary in the administration of another estate.

Unless the Banker's Association is merely quibbling over who will have the burden of drafting language, the Bankers' position must be that this is a conflict that is not waivable by the corporate fiduciary. That is an issue worthy of further debate and comment. I suggest that this should be waivable and that corporate fiduciaries can adequately protect themselves by agreement.

1.8(a)

A. I recommend that there be a "safe haven" provision for business transactions between lawyer and client, notwithstanding any asserted failure to comply with subparts (a)(1)-(3), that **permits a transaction between lawyer and client if the client is represented by independent counsel with respect to the transaction and such independent counsel is informed of the lawyer/client relationship.** Proposed 1.8(h)(1) allows a prospective limitation on malpractice liability if the client is independently represented. A business transaction needs no greater protection.

If an absolute safe haven is not adopted, then, at a minimum, the point of comment [4] (that the requirement of (a)(2) is inapplicable and the disclosure required by (a)(1) can be made by such independent counsel) should appear in the rule. (This is another illustration of something in the comments that directly contradicts the plain meaning of the rule.)

B. In one respect, I recommend that the rule be strengthened. I suggest deleting the last clause of proposed (a)(3) and, instead, expressly **prohibiting** a lawyer from representing the client in the transaction between the lawyer and client.

C. Related to "B," the "informed consent" requirement should not be applied here where the lawyer and client are "adverse." The lawyer should have the obligation to disclose that the lawyer is not representing the client in the transaction, not an obligation to advise the client on the client's decision whether to consent. The lawyer can be required to disclose that it is desirable for the client to consult with independent legal counsel. As in other contexts, I suggest using alternatives to requiring written disclosure. A writing should be encouraged because it assures that the warning is given, not because the writing itself has independent significance, where it is conceded that the warning was provided. Thus consider a higher burden of proof or a "statute of frauds" analogy.

D. The rule itself should contain a modification of the statement found in proposed comment [1]:

> This rule does not apply to fee arrangements between client and lawyer, which are governed by Rule 1.5.

As discussed above (in the context of other rules and comments), all restrictions on fee agreements should be found in Rule 1.5. No exception should be made for fee agreements that involve payment by way of an interest in the client's business. If the agreement is excessive, then it is prohibited. If the fee (in whatever form it takes) **is** reasonable, then 1.8(a) should not prohibit it. At a minimum, 1.8(a) should not apply to an initial fee agreement by which the client becomes a client. That is, until the time an initial fee agreement is made, the "client" is not a client and the standards of 1.8(a) should not apply.

E. As discussed above in part III.1., the portion of proposed comment [1] that declares that the rule does not apply to situations (standard commercial transactions) otherwise

clearly within the plain meaning of the rule itself should be moved to the rule itself and the exception should be broadened to cover standard commercial transactions that the lawyer provides—other than through his profession as a lawyer—if on standard terms provided to the public. One possible wording would be:

> 1.8(a) does not apply to standard commercial transactions between a lawyer and client for products and services that the client or lawyer generally markets (in businesses not associated with the practice of law) to others; provided, however, that the terms of any such transaction should not be significantly different from that offered to others.

F. Rule 1.8(a) (proposed or existing) also needs an additional clarification (probably after further debate) as to whether it applies to transactions between a lawyer's client and **an entity in which the lawyer has some interest** (as sole owner, or some percentage owner, or as an officer or director). The current and proposed rule speak of "a lawyer" not entering into a business transaction with a client, but a much more common occurrence, today, might be a transaction between the client and a corporation/LLC/partnership owned (in whole or part) by the lawyer. As a practical matter, the rule cannot prohibit transactions in which a lawyer owns <u>any</u> percentage, because that would include large publicly held companies. Nevertheless, if the rule is to be applied other than what it literally states now (a transaction only with the lawyer personally), then <u>some</u> description of the limits of the expanded scope should be expressly supplied. Compare proposed Rule 5.7(a)(2) which addresses provision of law-related services by "an entity controlled by the lawyer . . . ."

G. Comment [5] to proposed Rule 5.7 states that "when a client-lawyer relationship exists with a person who is referred to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer who complies with Rule 5.7 is not required to comply with Rule 1.8(a)." That should be expressed in the text of both Rules 1.8 and 5.7, not buried in a comment to the latter, if it is accurate. (This position, however, is directly contrary to a statement in the comment [1] to proposed 1.8 to the effect that Rule 1.8(a) applies to lawyers engaged in the sale of goods or services related to the practice of law.)

H. See my notes, below, to 1.8(j) and the submissions of others concerning the imputed aspects of Rule 1.8(a). If there is to be imputation as to Rule 1.8(a), then 1.8(a)'s prohibition should only apply to a lawyer who <u>knowingly</u> enters into a business transaction with a client. The current and proposed versions of 1.8(a) use "knowingly" only with respect to acquiring interests adverse to a client. It makes sense to assume that a lawyer knows who is a client <u>of that lawyer</u>. That assumption is nonsense, however, when speaking of imputing <u>this</u> prohibition to each lawyer in a law firm of substantial size. Firm-wide conflict checking is a necessary burden as to client representation. Expanding that to a requirement for <u>every</u> personal business transaction risks bogging down conflict checking systems to the delay and detriment of expeditious conflict resolution. It just is not practical.

1.8(b)

A. This limitation on use of information corresponds to proposed Rule 1.6, and any changes in the scope of confidentiality in the final 1.6 should also be reflected here. (The current Michigan rules, unfortunately, did not do this, resulting in current Rule 1.8(b) using "information related to representation of a client" phrase while current 1.6 retained the "confidences and secrets" terminology. This disconnect should be eliminated in adopting any modification of the rules.)

B. Use of information to the disadvantage of a client is a circumstance in which a strong inference exists that a client would not consent. Nevertheless, there is no good reason why a lawyer should be subject to discipline where the fact of a client's consent is undisputed but such consent merely was not "in a writing signed by the client." Having a provision such as MCR 2.507(H) (*i.e.*, an alleged consent—if denied—is not enforceable if not in writing signed by the client) is a preferable alternative.

1.8(e)

A. This is an area in which I have little experience and, thus, I must defer to others. Nevertheless, so long as contingent fees are permitted, the supposed rationale (expressed in the comments) for this rule (*i.e.*, a lawyer's financial assistance would "encourage clients to pursue lawsuits that might not otherwise be brought" and gives "too great a financial stake in litigation") lacks weight. Reexamination of the rules should be seen as an opportunity to eliminate this restriction, if there is no better rationale and there is some counterpoint (the irony of a lawyer who may earn a million dollars from a contingency fee; yet the lawyer must allow her client to remain homeless or starve while the case is pending). If the rule goes, so does comment [10].

1.8(f)

A. Because a client's informed consent should be **sufficient** for a lawyer to accept compensation from another, the subrule should end at proposed 1.8(f)(1). There is no problem with the lawyer and the client being reminded that the lawyer's duty is still to the client, not the person who pays the lawyer or that there remains a duty of confidentiality under 1.6. The point, however, should not be that the lawyer's acceptance of payment is improper. Not treating the client as the client (for all purposes, including confidentiality) is improper. That point is made in both 1.6 and 5.4 and is not needed here.

B. As to informed consent, I would, as previously discussed, recommend a distinction between consent from someone who, at the time of consent, is not a client and someone who is already a client. If compensation from another—maybe even another client—is a condition for the lawyer/client relationship commencing, then the lawyer should only be required to disclose the circumstance and, perhaps, the desirability of the proposed client consulting with independent counsel with respect to the payment arrangement.

C. Rule 1.8(f) (current and proposed) represents another disconnect (similar to that in 1.8(b) described above) with current Rule 1.6, insofar as the scope of confidentiality is concerned. To the extent that the rule of confidentiality must be repeated in this subrule and the current scope of confidentiality is retained in 1.6, then this disconnect should be corrected.

D. Whether addressed in this subrule or in Rule 5.4—whichever or both will address the impact of someone other than a client paying for the lawyer's services—the rule should recognize explicitly that a client is free to assign decision-making on behalf of the client to someone else. For example, assume a management level employee is sued but her employer is not. Her employer agrees to defend and indemnify her on the condition that she agrees that her employer will get to make the decisions in the litigation, do all of the communicating with the lawyer (after an initial consultation) and use the employer's regular lawyer to defend. The employee wants to do that and consents. The lawyer (or independent counsel hired by the employee) explains to her what the effect of this is or will be. Does that arrangement constitute "interference with . . . the client-lawyer relationship" as prohibited by current and proposed rule? If the answer is "no," **because** the client consented, then what is the point of 1.8(f)(2)? I submit that the arrangement is proper and the contrary implication in 1.8(f)(2) is not.

The real issue, to be addressed is what happens when a client changes her mind and revokes her consent. I suggest that 1.8(f) should state:

> A lawyer shall not accept compensation for representing a client from one other than the client unless the client consents. The lawyer must still comply, where applicable, with Rules 1.6, 1.7, and 5.4 and provide independent professional judgment on behalf of the client, except that a client may consent to the lawyer providing information to and taking direction from someone other than the client, including the person compensating the lawyer for representing the client. Such consent, however, may be revoked at the discretion of the client, although the

lawyer-client relationship is (at the lawyer's option) terminated by such revocation, subject to the direction of any involved judicial tribunal as provided in Rule 1.16.

1.8(g)

The requirement of consent signed by the client remains a trap, creating a violation of the rule for mere failure to follow a formality—even where there is no dispute over whether consent was actually given. There should be no violation where it is undisputed that consent was given and the client merely changes his mind. Language comparable to that in MCR 2.507(H) could be used. See my suggestions above as to 1.8(b).

1.8(i)

If contingent fees and charging liens are permitted (and they are), there is no persuasive rationale for this subrule. See my discussion of 1.8(e). If the agreement by which the lawyer acquires an interest is part of the fee agreement, it should be subject to Rule 1.5. If it is not part of a fee agreement, it should be subject to 1.8(a). No additional restriction is needed.

The policy behind the rule, as expressed in comment [14], suffers from the weakness of latching on to the inability of **some** clients (though the comment says "many") to evaluate such agreements. Rules applicable to **all** clients should cease to be founded on fears that **some** clients will be hurt. Keeping the rule unfairly restricts the clients who **are** capable of evaluating the situation and who desire to proceed contrary to the paternalistic view of the rule. (An alternative would be to draft a rule that more narrowly addresses the situations which supposedly require it.)

The rule is not needed to advance a policy that the client retains the right to discharge the lawyer, despite the lawyer's interest in the matter. That principle of law has been clear in Michigan, even in a contingent fee situation. If a lawyer wants to proceed with that risk, then so be it. If some rule on this subject is needed, it could be stated more simply as: "A lawyer's property interest in a cause of action or subject matter of litigation shall not affect the client's right to discharge the lawyer, if the client so chooses."

1.8(j)

A. I concur in the concerns expressed in the observations made by Ms. Proctor as to proposed 1.8(j). Any imputation with respect to the restrictions in 1.8 should be expressly subject to the exception on imputation found in the proposed Rule 1.10(a) (prohibitions based on personal interest of the prohibited lawyer which do not present a significant risk of materially limiting representation by other lawyers in the firm).

B. In addition, prohibitions from 1.8 which are imposed on other members of a firm should be limited to **knowing** violations. For example, as discussed above, 1.8(a) states that a lawyer shall not enter into a business transaction with a client (subject to exceptions). For the lawyer who works with that client, this should not be a problem. For a lawyer who is in a law firm of substantial size, however, the lawyer simply cannot know who all the clients of the firm are. A lawyer should not be required to check all client databases for a law firm every time the lawyer enters into any business transaction.

C. Furthermore, the restrictions of 1.8(a) should remain personal to a **lawyer who represents the client, in the absence of a reason for the lawyer to believe that the client may think of the other lawyer as the client's lawyer**. That is, even if lawyer B in a firm knows that lawyer A is a client of lawyer B, there should be no ethical violation by reason of lawyer B entering into a business transaction with the client, provided that lawyer B has not ever personally represented the client and the client is not aware that B is a member of A's law firm.

1.9

A. As described above in part III.3., 1.9(a) and (b) should be modified to clarify that they apply only to situations where the new client's "interests are **directly and** materially adverse to the interests of the former client . . . ." Addition of the "directly and" would make it clear that the prohibition is not any **broader** than the prohibition found in proposed 1.7(a)(1). A lawyer should not be prohibited from representing someone "adverse" to a former client (without consent of that former client), if the lawyer would not be prohibited from representing someone similarly adverse to a current client (without consent of that current client). If the adversity is not "direct" as that is meant in proposed 1.7(a)(1), then the conflict issue should simply be resolved between the lawyer and the lawyer's current client under proposed 1.7(a)(2)—subject to confidentiality duties covered by 1.9(c).

B. Proposed Rule 1.9 provides a good illustration of where and why the "informed consent" requirements should not be applied—in 1.9(a) and (b). This rule focuses on a **former** client. The most that should be required—if anything—is that a lawyer seeking consent from a former client should inform the former client that it would be appropriate for the former client to consult with another lawyer. A new duty of "explanation" should not be imposed. The lawyer clearly has a conflict of interest in giving "advice" to the former client and should not be placed in a position of being required to give advice in that setting.

C. As to the "confirmed in writing" requirement, I concur in the Representative Assembly's recommendation to delete that requirement. Where it is not disputed that consent was obtained, the "confirmed in writing" requirement should not be a basis for possible discipline, thereby creating a tool for extortion to be exerted against the lawyer.

D. A common practical situation related to "consent," but not involving actual consent to a conflict, is not addressed in the rule. There are times when it is unclear whether the subject of a representation will be viewed as "substantially related" to a former representation. As a result, sometimes, what is most needed is confirmation that the matters are **not** substantially related (so consent is not necessary). Any such acknowledgment, if obtained, should also be treated as a consent under 1.9(a), if the two matters are later asserted to have been substantially related. One possible wording would be to add to 1.9 the following:

> An acknowledgment that matters are not substantially related (or that the representation is not materially adverse to the former client) will be deemed a consent to the representation, for the purpose of this rule.

E. For reasons explained in more detail below (in my discussion of the comments on the "substantial relationship" test), I recommend that 1.9(b)(2) be modified to use a "participated personally and substantially" standard, as is done in 1.11(a)(2) and 1.11(d)(2)(i), rather than using a test about having acquired material confidential information. The duty of confidentiality should be addressed in 1.9(c) and not mixed with 1.9(a) and (b), which should focus instead on a duty of loyalty. (Comments [5] and [6] would have to be revised accordingly.)

F. The comments should be changed to remove the issue of "confidential information" from the test for a "substantial relationship." **I hasten to add that my position is different than most ethics pundits who have opined on the Model Rules since adoption by the ABA (and Michigan).** Principles for dealing with the former client situation derive mainly from dual concepts of loyalty and confidentiality. (Those were the rules in the former Code that, along with the "appearance of impropriety," were cited in creating concepts of former client conflicts.) These two **different** obligations have been mixed, inappropriately, over the years, and it is time to separate them, as they were expressly separated when the Model Rules were drafted. The rules divided these two concepts and placed the confidentiality concern in 1.9(c)—where it belongs. Unfortunately, that division usually has been ignored in applying Rule 1.9.

Rule 1.9(c) adequately prevents improper use or disclosure of information obtained by reason of a previous representation. (This is another area of disconnect with Rule 1.6. If the current scope of confidentiality is maintained, the disconnect should be corrected). 1.9(a) and (b) should be limited, in turn, to recognizing and enforcing the "loyalty" aspects of a lawyer's relationship with a client. Thus, the point made at the end of comment [2] ("The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.") should be the **only** test for a substantial relationship. Because of that, the bulk of what is in comment [3] should be deleted, because it incorrectly confuses the obligation of confidentiality with the obligation not to be directly adverse in a substantially related matter.

Therefore, the substance of the last sentence of comment [2] should be moved to a much shorter comment [3], stating only:

> [3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or such that a duty of loyalty can fairly be said to be breached. The underlying question is whether the lawyer's involvement in the subsequent representation can be justly regarded as a changing of sides in the matter in question.

This would eliminate a confusing analysis as to what information the lawyer **might** have obtained (but may not have obtained) in the normal course of the prior representation and how such information relates to the current matter. The lawyer is obligated to keep that prior acquired information confidential, but the mere furnishing of confidential information is not sufficient to disqualify the lawyer at the insistence of the former client.

The issue of confidentiality can have a role in the conflict analysis even under my suggested approach. It would be treated, however, as a 1.7(a)(2) issue affecting the representation of the current client. That is, the question will be whether there is "a significant risk that the representation of [the current client] will be materially limited by the lawyer's responsibilities to . . . a former client . . ." to maintain confidentiality of information obtained in the course of the former representation. Furthermore, if an adequate disclosure cannot be made to meet the tests (whatever test is adopted) for consent by the current client, then the matter cannot be undertaken. In this way, the duty of confidentiality to the former client is recognized

and enforced, but the real test is whether such a duty will interfere with the duty to the current client.

G. A recurring circumstance with respect to dealing with former clients on matters of confidentiality could be aided by a further clarification to this rule. Frequently, issues of confidentiality or disclosure for former clients (of Lawyer A) arise in communications with a current lawyer (Lawyer B) for that former client. If Lawyer B is representing the client in the matter in which the confidentiality issue arises, a separate direct communication from the former client on the issues of consent and assertion of confidentiality should not be required. (Indeed, one might well argue that a direct communication could be forbidden by Rule 4.2) I suggest that Rule 1.9(c) state:

> The lawyer may accept instruction from the former client's current lawyer with respect to assertions of confidentiality or consent for disclosure.

At a minimum, I suggest that this be put in a comment.

H. The last sentence in comment [6] (and the introduction to comment [7]) is not correct (or irrelevant to this rule) as applied in Michigan—and illustrates why I am concerned that a careful review be made see if comments fit with Michigan's rules. The last sentence in [6] should not refer to a burden of proof resting upon "the firm . . . ." In Michigan (unlike the ABA situation) 1.9(b) only deals with disqualification of **the lawyer, not the firm**. In Michigan, Rule 1.10 allows for screening in this situation to permit others in the firm to proceed even where the transferring lawyer is disqualified.

1.10

A. I concur in Ms. Proctor's comment on the inconsistency between proposed 1.10(a) and proposed 1.8(j).

B. The reference in 1.10(a) should not be to 1.9, but, at most, to 1.9(a). 1.9(b) is expressly limited to the transferring lawyer, and its impact on other lawyers in the new firm is covered by 1.10(b). To make this clearer, 1.10(a) could start: "Subject to (b)-(e), while . . ." and then replace the reference to 1.9 with a reference to 1.9(a). In addition, because I recommend retaining Rule 2.2, that reference here should also be retained.

C. The introductory part of 1.10(b) should be revised to eliminate a confusing statement also found in the current rule. **The reference to "or a firm with which the lawyer was associated" should be deleted.** The reference is to disqualification under 1.9(b) which only deals with disqualification of a **lawyer** who has changed firms. That is, 1.10(b) is to address screening where an individual lawyer has changed firms and that individual lawyer would be disqualified under 1.9(b). The fact that the transferring lawyer's former **firm** would be disqualified is not the relevant fact. If the lawyer himself/herself does not fit the requirements of 1.9(b), then neither that lawyer nor the lawyer's new firm is (or should be) disqualified—regardless of screening or lack of screening. (The continuation of this language again suggests that the proposed rules were not carefully reviewed for applicability to Michigan.)

D. Rule 1.10(b)(2) is also affected by the proposed new definition of "tribunal" to include arbitrators. An arbitrator (who does not need to even be a lawyer) over a dispute between a client and someone else should have no role in determining compliance with these rules that govern the relationship between a lawyer and his client. Either the definition of "tribunal" needs to be changed or this rule should be limited to judicial tribunals.

E. 1.10(b) and (c) should be rewritten so as to recognize that the rules are directed to lawyers, not law firms, although lawyers are obligated to see that their firms take reasonable steps to have lawyers conform to the rules. The introduction to 1.10(b) could say, "When a lawyer becomes associated with a firm, another lawyer in that firm may not knowingly . . . ." That is not a major issue to me, but it may be to some who want (or oppose) direct regulation of law firms, rather than just lawyers.

F. 1.10(d) (current and proposed) fails to distinguish between consent of a current client and consent of a former client to waive imputed disqualification. The reference should not be just to consent under 1.7 but also to the possibility of consent under 1.9. **Those conditions are not the same—even under the proposed rules. Even as proposed, there are no conditions other than informed consent, confirmed in writing, under 1.9, while 1.7 has several conditions.** Comment [6] should be changed accordingly. (It also is beyond comprehension how the author of comment [6] could have written that the conditions in 1.7 require that "each affected client or **former** client" has consented, when 1.7 does not apply to former clients.) The cross references in comment [6] to advance waivers should take into account any changes to that concept, as discussed above.

G. Either 1.10(d) or its comments should provide or explain that a former client can waive imputed disqualification based on a screening arrangement other than that required by 1.10(b). That is, if a former client can waive imputed disqualification in total, then that former client should also be able to waive imputed disqualification based on accepting a screening procedure that may be less than that required in the absence of a waiver. One recurring practical example is the requirement to give notice to the tribunal in 1.10(b), which the parties may often prefer to delete (to avoid a judge mucking around—sorry if anyone is offended—in something about which the judge usually knows almost nothing).

H. I disagree with Ms. Proctor's suggestion to delete proposed 1.10(e). Indeed, proposed 1.10(e)'s cross reference to 1.11 should not be limited to "former or current government lawyers" **but should also apply to current or former government "officers and employees"**, as does proposed Rule 1.11 itself, (1.11(a) applies, by it terms to "a lawyer who has formerly served or is currently serving as a public officer or employee of the government . . . .") That is, 1.10(e) should state:

> The disqualification of lawyers associated in a firm with former or current government lawyers/officers/employees is governed by Rule 1.11.

Michigan's informal ethics opinions have repeatedly messed up the analysis of such situations of concurrent service by purporting to apply an amalgamation of inapplicable concepts and rules. Now is the time, finally, to get it right.

I. **The first two sentences of comment [4] (dealing with non-imputation of conflicts by reason of nonlawyer staff and employment before a lawyer became a lawyer) are important enough to be in the rule itself as a new subsection (f).** The rule needs to address this common situation, because of the variety of approaches that may be used to deal with nonlawyers and the ambiguity that can arise from the language of 5.3 dealing with nonlawyer staff. I suggest not including, in the rule, the third and fourth sentences of comment [4], but the following modification to the comment could be made:

> Nonlawyer personnel ordinarily must avoid communication to others in the firm of confidential information that the nonlawyers (including those who have since become lawyers) have a legal duty to protect.

J. Michigan's rule lacks an explanation of the requirement that fees not be apportioned to the screened lawyer. That should be added to 1.10(b)—or, at a minimum, to comment [9] (as revised per my discussion below). It is important enough to be in the rule itself. The description I would use is actually found in the current and proposed comments to Rule 1.11 (that is the only place the ABA rules provide for screening and non-apportionment of fees). The additional language could say:

> The requirement of 1.10(b)(1) not to apportion part of the fees to the disqualified lawyer does not prohibit that lawyer from receiving a salary or partnership share

> established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

(As an alternative to being added to this rule, the phrase "apportioned no part of the fees" could be defined in Rule 1.0.1.)

K. The last sentence in proposed comment [2] is simply wrong. The Ethics Committee's proposal was to change the ABA comment's reference from 1.10(b) to 1.10(c), presumably because, in Michigan, the substance of the ABA's 1.10(b) is made our Rule 1.10(c). But this ignores the fact that, in Michigan, the comments' reference to 1.9(b) is incorrect; that reference should be to our 1.10(b). In Michigan's current and proposed rules, **both** 1.10 (b) and (c) deal with imputed disqualification arising from lawyers changing firms. Thus, the correct comment would be:

> When a lawyer moves from one firm to another, the situation is governed by Rules 1.10(b) and (c).

L. **Comment [9] is an incorrect statement of the application of 1.10(b**), the error arising from the earlier attempt to revise ABA commentary which was intended for our 1.10(c) (the ABA's 1.10(b)). (Compare comment [9] with comment [5], which does apply to 1.10(c).) The situations are different, the rules are different, and the comments should be different. Comment [9] should read:

> Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly and materially adverse to those of a person formerly represented by a lawyer who has become associated with the law firm where that lawyer, individually, would be disqualified under 1.9(b). Even though the individual lawyer could not represent a client adverse to that former client (because the matters are substantially related), the firm is not disqualified, provided that the conditions of screening, fee non-apportionment and notice are met.

M. Last, Rule 1.10 should have an express cross-reference to proposed Rule 6.5, which acts as an exception to the principle of imputed disqualification.

1.11 and 1.12

A. The addition of 1.11(f) may be well intended but it is not necessary for the purpose it seems to be seeking to serve. That is, 1.11(a)-(d) already cover a part-time government lawyer/officer/employee because of changes to the draft rule to apply it to a person who "is serving" as a public officer or employee of the government. If any additional clarification is needed, 1.11(f) might be better understood if it merely said:

> A lawyer is serving as a government officer/employee and this rule, therefore, applies, even if the service is only part time.

Nothing in 1.11 states that the rule, as a whole, does not govern a part-time government official who acts in a role ("adjudicative" or not) in deciding matters in which lawyers appear before the official (alone or as a member of a board). 1.11(f), on the other hand, expressly excludes from that subsection the situation of a part-time government **adjudicative** officer, but no explanation is provided as to why there should be such an exclusion. Perhaps the omission and exception are because Rule 1.12 was intended to cover the adjudicative officer situation. Rule 1.12 (if applicable to a part-time adjudicative officer, despite its contrary title), however, would allow lawyer A from Firm XYZ to appear before a governmental agency board on which lawyer B (also with firm XYZ) actually is sitting and participating, so long as **lawyer B** is screened and apportioned no part of the fee and notice is given to the parties and tribunal. I don't believe that is good policy or what was intended. My proposal to cure this is three fold:

1) Expressly provide that 1.11 applies only to non-adjudicative positions.

2) 1.12 should be clarified. It should apply to current part-time governmental adjudicative positions.

3) Add parallel provisions to 1.11 and 1.12 covering current part-time positions in which the part-time government official is on an agency board or tribunal deciding (for 1.12, "adjudicative," for 1.11 otherwise) claims or requests as to which private practice lawyers "appear" before the agency or tribunal. Very roughly, this could be something like:

> Regardless of any screening or governmental consent, other lawyers with whom the current part-time governmental officer/employee is associated in private practice cannot represent clients in matters appearing before the governmental agency/board as to which matters the part-time governmental officer/employee has or will have personally and substantially participated as a decision-maker or advisor to a decision-maker. If the part-time government officer/employee, as such, has not and will not have personally and substantially participated in the matter, other lawyers with whom he is associated in private practice are permitted to appear before the same governmental body with respect to

> the matter; provided that the screening, no fee apportionment and notice provisions of this rule are also met.

Comments would need to be revised to reflect my suggested changes. (Other lawyers in the law firm will still need to avoid implying any ability to improperly influence the government agency. 8.4(e).)

B. The substance of comment [6] to Rule 1.11 and comment [4] to 1.12 (re the meaning of no apportionment of fees) should be placed in the rules themselves. See my above discussion concerning the same point to be placed in Rule 1.10. (Again, because of multiple use of the same phrase, this could be added to Rule 1.0.1.)

C. "Informed consent" should not be required in 1.11(a)(2) (from the governmental agency) or in 1.12. **The doctrine of "informed consent" should not apply between a lawyer and anyone other than that lawyer's client, for the reasons discussed earlier**.

D. The proposed "confirmed in writing" requirement should be replaced by a provision that encourages such written confirmation, rather than being an unconditional requirement, as discussed earlier in connection with other rules.

E. The addition of "mediator or other case evaluator selected as a partisan" in 1.12(d) appears to be the nonsensical result of trying to fit the ABA rules to Michigan practice. The rule makes sense for a partisan arbitrator, but I am aware of no situation in which a mediator or case evaluator is recognized in Michigan as a partisan.

1.13

A. A negligence standard is not appropriate in the context of 1.13(d)'s provision about explaining the identity of the client to constituents of an organization. The current rule places the burden on the lawyer when the lawyer "believes that such explanation is necessary to avoid misunderstandings on their part." The proposed rule requires the explanation "when the lawyer knows or reasonably should know" the organization's and constituent's interests are adverse. The rules should **not** impose negligence type duties ("reasonably should know") on a lawyer toward someone other than the lawyer's client in any but the most extreme situations. This situation does not call for that. The standard should be "when the lawyer knows or believes . . . ."

B. Another point that could use clarification either here or in the conflicts rules is the identity of the client in a governmental setting. Comment [6] states that such "is a matter beyond the scope of these Rules . . . ." Although attempting to address all of the ramifications of such a description may well be beyond the scope of the rules, certainly the client identity for the purpose of dealing with conflicts should not be. Indeed, in the non-governmental sector, one of the purposes of 1.13 is to make it clear that an organization, not its constituents, is the client. The rules should clarify this difficult issue as to government agencies.

Several ethics opinions suggest that representing a particular part of a government entity (e.g., a state department or agency) does not create a conflict for the lawyer who also represents a private client against a different department or agency of the same government. That proposition makes sense and should be adopted. I recommend that an additional provision be added to 1.13 to specifically address the governmental organization situation from the perspective of a private practice lawyer.

1.14

A. The subject of the first two sentences of comment [4] (that the lawyer can look to an appointed representative for decisions on behalf of a person with diminished capacity) should be **placed in the rule**. I disagree, however, with calling the person with diminished capacity the "client" in such a circumstance. Ordinarily, the appointed representative should be seen and treated as the client, with the result that the lawyer's duty is to the representative and the representative's duty is to the person with diminished capacity. Thus, the rule should have a new subsection that states:

> If a legal representative has already been appointed for a person with diminished capacity whose interests the lawyer is engaged to represent, the lawyer should ordinarily look to the representative for decisions on behalf of such person. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is engaged to represent the minor's interests. If a lawyer intends to represent only the minor or other person with diminished capacity and not the legal representative or natural guardian, then the lawyer should disclose that fact to the legal representative or natural guardian.

B. The last two sentences in comment [4] (beginning with "If the lawyer represents the guardian . . .") reflect a position which does not belong in this comment and may be contrary to Michigan law. If the reference is truly intended just to be to Rule 1.2(d) (as it states), that earlier rule only concerns a lawyer assisting in "criminal or fraudulent" conduct—not merely where a lawyer "is aware that the guardian is acting adversely to the ward's interest . . . ." On the other hand, if what is really intended is to refer back to comment [11] to Rule 1.2, the comment is not a correct statement of Michigan law. Indeed, a lawyer acting on this comment [4] to Rule 1.14 is likely to have a court sanction that lawyer or be faced with a grievance. *See*, *In re Estate of Powell*, 160 Mich App 704 (1987); *In re Makarewicz*, 204 Mich App 369 (1994).

1.15

A. As discussed above, the requirement in (proposed and existing) 1.15(a) about keeping a trust account in the state where the lawyer's office is located is unnecessarily restrictive for multi-state law firms. It should be sufficient if an account is in "a state where the lawyer's office or any other office of the law firm with which the lawyer is associated is located."

B. Ms. Proctor's comment on the type of institutions in which the account must be maintained has merit. I am not aware of why this limitation was not continued. The Staff Comment did not recognize this change.

C. Proposed 1.15(b) (allowing a lawyer to deposit funds to pay bank charges) is reasonable, if there is some evidence it is needed in Michigan.

D. I am aware of no need for the change in 1.15 (deleting language in old 1.15 and adding language to proposed 1.15(c)) to include placing advance payment of **expenses** into a trust account. If writing on a clean slate, the proposed rule might make sense (but see below), but this is not writing on a clean slate. This is a major change that would need to be highly publicized so that inadvertent lawyer error does not occur, particularly because of the AGC's history of requiring strict compliance with Rule 1.15. In addition, this change could cause an administrative nightmare, if applied to previously made (and held) advances of costs and expenses. (One reason for distinguishing funds paid for expenses from funds paid for fees might be that it is more common for lawyers to decline to advance funds for expenses for clients than it is for lawyers to decline to provide services without advance payment of fees, and fees are viewed as generally involving larger sums than expenses. Trust account procedures for paying fees often can involve significant time delay, which may not be practical for paying expenses. I simply do not know how big a problem this may be, either way, but I fear that will only be learned after a modified rule is adopted.)

E. The last sentence of proposed 1.15(c), in conjunction with proposed 1.5(f), is the result of good intentions but the language may need tweaking to avoid unintended consequences. That is, these provisions are intended to make it clear that non-refundable retainer agreements are permitted, and, accordingly, placement of such retainers should be in the lawyer's own account rather than a trust account. The condition found in 1.5(f)(4) (that the lawyer, in fact, set aside a block of time, turn down other cases, and marshal law firm resources in reliance), however, often will not exist at the time the non-refundable retainer is received. So what is to be done with the money? If the requirements ultimately are met, then the money was that of the lawyer, not the client, and placement in the trust account would be improper commingling. If the requirements ultimately are not met, then the money was the client's, not the lawyer's, and placement in the lawyer's own account was improper. This problem appears to be correctable by modifying the last sentence of proposed 1.15(c) as follows (I have referenced 1.5, generally, rather than 1.5(f) so as to apply even if 1.5(f)(4) is not adopted. See comments, above, about proposed Rule 1.5.):

> Nonrefundable fees that the lawyer reasonably believes comply with Rule 1.5 may be treated as fully earned when received and should not be deposited in a client trust account; provided that, at such time as the lawyer reasonably believes that the conditions in 1.5 will not be met, or the clients asserts that the fee was clearly excessive, any then unearned portion of the fee and any portion as to which there is a dispute as to whether it is earned or unearned shall be deposited in a client trust account.

F. A more fundamental issue—not caused by the proposed rule but not resolved by the proposal either—is **whether clients should be able to consent** (maybe even using the highest standard of informed consent, confirmed in writing) to some variation in the rule's required treatment of payment of fees or expenses. For example, I suggest that a client should be able to agree that the lawyer can apply prepaid funds to fees (or fees and expenses under the proposed rule) at the time the fees are earned (or expenses incurred), with an obligation to account within a reasonable time thereafter. This is a practical issue that can actually reduce confusion, allowing an invoice to reflect fees and expenses incurred and crediting prior payments at the time of creating an invoice. (Note: Discipline has been imposed for applying funds to fees at the time an invoice was dictated but the invoice wasn't actually mailed until a day or so later!)

1.16

A. Because of the new definition of a "tribunal," proposed 1.16(c) would allow an arbitrator to order a lawyer to continue representation or refuse permission to terminate representation of a client. An arbitrator (who isn't necessarily even a lawyer) need not have the slightest familiarity with or concern for the ethical issues arising between a lawyer and client. Authority to compel continued representation should be vested only in a **judicial** tribunal. I suggest inviting further comment on whether administrative or legislative bodies should fall within the concept of "tribunal" for this purpose.

B. As mentioned above (in part III.3), with respect to 1.16(d), it would be helpful to clarify what a lawyer needs to provide (in the form of documents in the lawyer's file) to a client upon termination of the attorney-client relationship as to a matter. This is something that is not uniform throughout the states—even in states with identical rules—because the rule abdicates an explanation, by stating the client should get the papers and property "to which the client is entitled."

It is true that this is principally a question of law, but certainly one of the more common allegations by the Grievance Administrator is the assertion that a lawyer has failed to supply file materials to the client. As a result, the **ethical** obligation ought to be made clearer in these rules. Thus, **at least for the purpose of discipline alone**, the rules should list what does and does not need to be provided to the client upon termination—leaving to the "law" what the client may be able to obtain in a civil lawsuit. A "comment" could make that distinction. One possible provision in the rule itself would be to add to Rule 1.16(d) the following:

> Subject to any contrary agreement between the lawyer and client confirmed in writing or to lien rights the lawyer may have, a lawyer, upon request from the client, shall surrender the following papers and property (to the extent that they then are possessed by the lawyer) to the client:
>
> - Original materials which the client supplied to the lawyer
>
> - Originals of any papers and property created by or obtained by the lawyer for the client and in the course of the representation, to the extent such originals have intrinsic value over a copy (*e.g.*, a will, deed, affidavit, contract or similar document with original signatures) or for which a client has special need for the original.
>
> For all other materials, the lawyer shall provide the client reasonable access to the papers or property (including the lawyer's work product, except as provided below) obtained or created in the course of the representation and shall provide copies, at the expense of the client. The client shall not, however, be entitled to access to the lawyer's administrative records, materials that may reveal information about other clients of the lawyer, the lawyer's personal observations concerning the client, and materials that are within the lawyer's own attorney-

> client privilege or work product as to potential disputes between the lawyer and client.

(John Allen's submission's put a similar statement in a new Rule 1.4(c), and I have no objection to either the location or substance of that proposal, as an alternative.)

Taking a contrary approach, four university general counsel have proposed that the default position be that the client "owns" the file and, thus, is entitled to the originals (at no charge), although the lawyer may retain copies at the lawyer's expense. Such a position mistakes lawyers for manufacturers of "widgets." For the most part, however, lawyers provide services, not widgets.

The four university counsel and I do not disagree as to a client's ability to obtain originals in circumstance where possession of the original is important to the client for the client's purposes (other than a dispute with the lawyer). As to other documents, the four university counsel do not explain why Michigan law should recognize (as it does) that a physician owns his file for a patient (although the patient has a right of access) but the same should not apply to a lawyer's file for a client.

Mr. Allen's Bar Journal article (included with his submission) explains the rationale for the lawyer "owning" the file, that the core value is to protect client access to information, and the concept of what is an "original" (in an era of electronic filings and computer hard drives), such that the position of the four university counsel is simply out of date.

If the four university counsel are concerned about merely who pays for copies, the proposed rule allows the lawyer and those universities to agree to a different allocation of costs. Indeed, the client is just as likely to already have received a "free" copy as have paid for the copy/original being held in the lawyer's file.

1.18

A. I concur in the concerns expressed by Ms. McAllister and Ms. Proctor. If, however, an express obligation of confidentiality is to be imposed, as under proposed 1.18(b), the rule should also provide a "safe haven" for lawyers and law firms who receive such information. That is, Rule 1.18(c) should be deleted but some form of 1.18(d) could be retained. The rule should not provide that anyone is disqualified (because the point of the rule is protection of confidentiality, not loyalty) but would provide affirmative protection from attempts at disqualification (*e.g.*, if there were an assertion of a "de facto" attorney-client relationship) for (a) the lawyer who took reasonable precautions not to receive confidential information, and (b) other lawyers in the firm if the involved lawyer were screened. Consent by the prospective client would obviate disqualification of either the individual lawyer or other lawyers in the firm. (Because the prospective client is not an actual client, the obligations that come with the term "informed consent" should not be imposed in this situation.) Consent of the "affected client" need not be addressed here, because that is adequately covered in 1.7.

B. Proposed 1.18(a) does not define what is meant by "discusses." At a minimum, the substance of comment [2]'s limitation (excluding those who unilaterally communicate information to a lawyer without a reasonable expectation that the lawyer is willing to consider the possibility of forming a client-lawyer relationship) should appear in the rule itself. Alternative wording (written in terms of a safe haven concept) might be:

> No disqualification occurs by reason of a volunteered communication from a prospective client who did not give the lawyer a reasonable opportunity to decline to receive confidential information or where the prospective client did not have a reasonable expectation that the lawyer was willing to consider the possibility of forming a client-lawyer relationship with respect to the matter communicated.

A comment could then be added describing some examples of such situations (letters, emails, and voice mails containing confidential information not requested by the lawyer).

C. If the court is inclined to adopt proposed 1.18(c) (and I oppose that), prohibition of representation should only be for representing a client with interests "directly and" materially adverse to those of the prospective client. (See my discussion of this in connection with 1.9 dealing with former clients.) For a prospective client (as for a former client), the standard of materially adversity should be imposed **in addition to**, not in place of, direct adversity.

D. 1.18(d)(2)(i) should have, as part of the rule, a description of what is meant by "apportioning no part of the fee." That description is found in the last sentence of comment [7], but it should be in the rule itself. (Alternatively, because this phrase is used in several rules, it could be added to the defined terms in Rule 1.0.1.)

2.2

The proposed rules delete existing Rule 2.2. Perhaps mine is a voice in the wilderness, but my experience is that 2.2 is useful. Treating such situations as merely examples of representation of multiple parties under 1.7 is not an adequate replacement. The existing rule (or something like it) should be retained, because it does a better job (than just 1.7) of focusing on the issues a lawyer (and clients) must address in such a situation—including that **none of the clients are being fully "represented" as would occur with separate representation**, and that, **upon a later withdrawal, the lawyer will not represent either party in the matter**.

I don't disagree that the situation **can** be handled under 1.7 as written. It is better, however, that the potential problems and remedies for this special situation be highlighted. Existing Rule 2.2 does that now and that concept (whether in 2.2 or a new subpart of 1.7) is helpful.

2.3

Rule 2.3 (existing and proposed) is written for one purpose (an evaluation requested or impliedly consented to by a client for a third person, during the course of the lawyer's representation of that client), but it is worded broadly enough to cover an entirely different situation (in representing Client A, the lawyer is asked for an opinion on a matter that could also affect client B) that should be left to 1.7. I don't believe the second situation is what was contemplated as being addressed by the rule.

The latter situation may or may not rise to the level of "directly adverse." If it does, then both clients must consent under 1.7. If, however, the situation does not meet the standard of "directly adverse" under 1.7, then, under Rule 1.7 only Client A needs to consent (assuming that the lawyer can also reasonably conclude that the lawyer will be able to provide competent and diligent representation of Client A). Under 2.3 (current and proposed), however, the test is not direct adversity. Instead, the proposed rule is written in terms of "likely to affect the client's [client B, in my scenario] interests materially and adversely" (2.3(b)) and compatibility with the lawyer's relationship with client B (2.3(a)).

My solution is to add a new subparagraph (d) (drawn from the principles discussed in comment [2]):

> This rule applies only to the situation where the lawyer is retained by the person whose interest is the subject of the evaluation and the evaluation is made in the course of representing that person. If the lawyer is retained by a separate client to perform an evaluation that may affect the interests of a different client, that potential conflict situation is to be addressed under Rule 1.7.

2.4

A. A lawyer serving as a neutral should not be subject to discipline for failing to "reasonably" know that a party does not understand the lawyer's neutral role and the lawyer then not explaining the difference from representing a client. **Discipline** should not result where the lawyer did inform the unrepresented party that the lawyer is not representing that party. The first sentence of 2.4(b) is sufficient.

B. Neither comment [4] nor [5] is appropriate for this rule, although comment [4] is at least directed to the subject of a lawyer who has been a third-party neutral and, thus, can be a convenient cross reference. Comment [5], on the other hand, addresses the subject of lawyers **representing clients in** ADR processes, not acting as third-party neutrals. It should be deleted or moved to the text of one or more other rules.

3.3

The portion of comments [1] and [10] that reference application of the rule to ancillary proceedings "such as a deposition" should be revised. It is not 3.3(a)(3) (covering situations where the lawyer, the lawyer's client or a witness called by the lawyer "offers" evidence) that applies to such situations, but 3.3(b) (addressing "criminal or fraudulent conduct related to the proceeding). Evidence is not "offered" at a deposition. It is not "offered" until an offer is made at trial, hearing, or other submission to the tribunal. (3.3(a)(3) clearly does prohibit the lawyer from offering such false evidence at the trial or other hearing.) Once the lawyer knows the deposition testimony/exhibit is false, then 3.3(b) would require the lawyer to take reasonable remedial measures, if the lawyer knows that anyone intends to use that testimony/exhibit for a criminal or fraudulent purpose related to the proceeding.

3.4

One of several alternative changes should be made to 3.4(f), which prohibits requests that persons not "volunteer" information to another party.

A. It is not unreasonable for a lawyer to request that a witness agree not to be interviewed by another lawyer (or representative) for another party without allowing the first lawyer to be present (and have the testimony transcribed). The witness is not required to accede to that request. Such a request would not make the information inaccessible or require a subpoena. It merely is an attempt to have the same evidence available to both sides.

B. At a minimum, (f)(1) should be revised to expressly permit such a request to a **former** employee or agent of a client. Disclosure of privileged communications could be at risk in an interview of former employees by the lawyer for an adverse party. Indeed, as written, the plain meaning of the rule could prohibit a lawyer from requesting that a **former** employee of a client not voluntarily reveal relevant **privileged** information. Perhaps the rule's use of the term "employee" was intended to apply to former employees, but this should not be left in doubt.

C. Contrary to (f)(2), making a request also should not be inhibited by what the lawyer may believe as to the possible impact on a **non-client** to whom the request is made. The lawyer's duty in this situation should be to her client. Of course, the lawyer should not mislead or make any false statements about impact, but the lawyer **should not have a duty to a non-client** to be concerned about the effect on the non-client's interests.

D. Last, consider whether 3.4(f) applies, as written, to the common (perhaps universal) admonition given by lawyers to witnesses in preparation for deposition (and sometimes at depositions): "PLEASE JUST ANSWER THE QUESTION; DO NOT VOLUNTEER." If the witness is not a client or employee of a client, is it really intended that lawyers be subject to discipline for making such a request? Requesting a witness to stick to answering questions allows all attorneys to timely voice objections and preserve an accurate, understandable record.

E. Alternative language for (f) which addresses, to some extent, all of the above concerns might be:

> [A lawyer shall not:] (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
>
> (1) The person is a relative or a current or former employee or other agent of a client; or
>
> (2) The request is that the person insist that such information be voluntarily given only in a setting in which the lawyer will have the right to be present and participate (*e.g.*, in a formal discovery proceeding); or

(3) The request is that, in connection with a deposition or interview, the person fairly respond to questions which are asked but not volunteer information beyond what is asked.

3.5

Because the terminology was changed in part (b) of the proposed rule, the corresponding comment [2] should be similarly changed.

See also my suggestion for a definition of *ex parte* communications in Rule 1.0 or 1.0.1.

3.6

I suggest that the rule be deleted and that "gag orders" be left to the involved court, if such an order is to be imposed at all, under such Constitutional constraints as currently exist.

3.7

I suggest that Rule 3.7(a) have an additional exception:

(4) the trier of fact is not a jury.

The rationale advanced for the rule (confusing or misleading the trier of fact) is not applicable to a non-jury trial. Numerous opinions recognize that trial judges are assumed to understand and distinguish between argument and evidence. *See, e.g., People v Taylor*, 245 Mich App 293, 305 (2001) (judge's understanding of the law allows judge to decide a case based solely on properly admitted evidence). This change may also eliminate a need to clarify just what is meant by a "trial," an otherwise undefined term.

Without the suggested change, does this rule cover an arbitration "hearing" or a judicial pretrial evidentiary hearing? The comments, but not the rule, speak as though the rule applies to "tribunals"—which would include arbitration, as "tribunal" is now defined. One might argue that an arbitrator or arbitration panel can be as easily confused as a jury, but the rules of procedure in such a forum ought to be controlled by the parties or arbitration organization, not this ethical standard. (Application of this rule to arbitration would be particularly inappropriate, because the controlling arbitration rules may not limit advocacy only to lawyers.)

4.2

A. Lawyers ought to be able to know by looking at this rule itself—not just the comments—whether or not a government lawyer can directly communicate with the subjects of investigation/prosecution rather than through the lawyers for those subjects. If the substance of the exception for government lawyers is the way the Court wants to proceed, then Alternative B should be adopted, the exception not merely placed in a comment. If the government lawyer exception is rejected, then the comments should be reviewed and any comment suggesting something to the contrary should be removed. Not only comment [10] but also part of comment [5] addresses this subject.

B. As to the substance of the proposed exception, **I concur with those in favor of using Alternative A, and rejecting proposed comment [10]**. The reasons for the rule (as revealed in comment [1]) are equally applicable to government lawyers. Contrary arguments were rejected in Michigan 40 years ago, and the reasons for rejection are still valid. Opinion 202 (August 1965).

Any lawyer (not merely government lawyers) may feel frustrated if the lawyer believes that the opposing lawyer is not advancing the best interest of the opposing client. That belief may arise because the opposing lawyer represents multiple parties (maybe an employer and employee or merely persons who are alleged to have acted in concert, but one may be thought to be less culpable than the others) or because it is thought that the lawyer is looking out for his own fee interest rather than the best interest of his client. Years ago, it was not uncommon for a party to be approached directly to settle disputes without involvement of that client's lawyer. The ethics rules put a stop to that—and I think there was good reason to do so—as described in the comments to the rule. **If, however, the Court is now to abandon those principles in the government lawyer setting, then just plain abandon the rule totally and, once again, leave the field wide open**. There is no reason to think that private practice lawyers will behave more badly than government lawyers will, given freedom from constraint to overreach an opposing party and divide a client from her attorney.

Any client who believes that her lawyer is not acting in her best interest is not prohibited from approaching the opposing side's lawyer (even a government lawyer), announcing that she has terminated engagement of her lawyer and then communicating directly with that opposing lawyer. Once the lawyer/client relationship is terminated, Rule 4.2 does not prevent direct communication. (Another option under Alternative A of the proposed rule would be to approach a court for an order allowing the direct communication. Presumably, courts would not be easily convinced of the need to violate a lawyer-client relationship, but, in truly appropriate circumstances, the power to grant permission to do so would exist.)

C. **At a minimum, if there is to be a general exception for government lawyers, then the exception should go both ways—and any lawyer representing a client against a government agency should be free to communicate directly with any representative of that agency without permission from a government lawyer in the matter**. That exception, too, should be placed directly in the rule. Either way, this point should be clarified.

D. Reducing ambiguity and misunderstanding is why **I also recommend rejecting the Representative Assembly's choice not to replace "party" with "person."** Although current 4.2 uses "party" in the text, the title has always used "person," the comment always made it clear that using "party" was not intended to limit application of the rule to formal proceedings, and Michigan ethics opinions interpreting this and earlier rules (with the same "party" term) have recognized that the rule applies outside of formal proceedings. See Opinion 182 (Dec 1960) (the prohibition applies "whether before or after commencement of suit, where the opposite person or party is in fact represented, and known to be represented by counsel," the Canon containing no limitation for the matter being in litigation and the purposes of the rule being served whether or not there is litigation). Indeed, one frequently speaks of a "party" to contracts or a "party" to a dispute. A synonym for informal usage of "party" includes "person," although the term certainly could be given a more limited meaning. The change in terminology by the ABA was intended to clarify that the rule was not limited to formal proceedings. Use of the word "person" corresponds to similar usage in Rule 4.3 (dealing with an unrepresented person). The change to using "person" is a good change, to prevent misunderstanding of a too limited scope of the rule.

E. Reducing ambiguity in the rule is also a reason to make further changes. **This rule is a prime example of one where comments should be moved into the rule, if they accurately reflect what is intended**.

First, the language in the second to last sentence of comment [4] (a lawyer can advise a client concerning a communication that the client is legally entitled to make) should be in the rule itself. This is a recurring issue of importance and the answer is not at all obvious from a combination of this rule and 8.4. (The substance of this same point is found in comment [1] to 8.4, but it is nowhere to be found in the rules themselves.) This may also address some of the concerns raised by government lawyers and law enforcement personnel. It does not approve turning the client into the lawyer's hand-puppet, but it does provide some protection for legitimate advice.

Second, the rule itself should include an explanation of how "person" (or "party") is to be applied to an organizational client. (I discuss this above in part III.1.) Thus, if the thrust of the descriptive parts of comment [7] accurately describe the Court's intention, that (or something like it) should be placed in the rule itself.

My recommendation, however, is that the prohibition for communication with "constituents" be both broader and narrower. **If the current employee's statements are such that an opposing party could offer those out-of-court statements directly in evidence—because of the employee's status as an employee--then the communication should be prohibited, absent the consent of the organization's known lawyer in the matter**. A lawyer should not be able to argue that, in interviewing an employee, she is not directly communicating with an entity represented by counsel and later offer the employee's statements in evidence on the ground that the statements **were** those of that same entity. This category would be in addition to those listed in the first sentence of comment [7]

On the other hand, I would exclude former constituents from being off limits to direct communication. Nothing a former constituent says or does is, at that time, a statement or act of the organization. No communication with such a former constituent can interfere with the relationship between the lawyer and the client organization. Certainly, such communications could make it harder to prevail in representing an organization, but so can communications by an adversary with any witnesses.

Thus, the only legitimate exceptions to the second sentence in comment [7] (which recognizes the general rule that contact with former constituents is not restricted) should be ones that establish that the relationship between the constituent and the client organization is ongoing and not purely "former." The other supposed former constituent exceptions (e.g., the individual has participated in the litigation or was exposed to privileged or confidential information concerning the case or organization during employment; or the individual performed acts or omissions that may be imputed to the organization) should not be placed in the rule. That is not to say that a lawyer can seek to cause such a person to breach privileges or duties of confidentiality—but nothing that an opposing lawyer does in communicating to these latter types would interfere with the lawyer-client relationship between the other lawyer and its organizational client or cause a client to make uncounselled disclosure of information. The individuals in these last categories are witnesses, not "parties" or "persons" represented by the organization's lawyer. (The possibility that a communication between a lawyer and a former employee may fall within a lawyer-client privilege—a concept that is not universally accepted—is not the same as—although similar to—whether any statement made by the former employee can be used as a statement by the organization.)

(Note that if my approach were used, other aspects of the proposed comments must be carefully reviewed for consistency. For example, the statement in comment [1] about a purpose being to protect against "uncounselled disclosure of information relating to the representation" might be modified to state "uncounselled disclosure by the represented person of information relating to the representation." That could be understood as the current meaning—as drawn from the introductory clause—but it is better to eliminate any confusion.)

F. It would be better for all Michigan lawyers if further clarifications are proposed, debated, and adopted (whether or not consistent with my view). May lawyers communicate with current or former employees of an adverse, represented party, or not? It is a common, recurring issue. It is time that the rule itself provide clarification. If the resolution of this issue were placed in the proposed rule itself, rather than left to the commentary, I suspect that there would be a greater debate on which resolution is appropriate for Michigan.

G. I suggest that the rule include a description of what a lawyer may say (or ask) when a client for another lawyer attempts to initiate a communication with the first lawyer. Such a lawyer should be entitled to state, in substance: "I am not permitted to communicate with you with respect to any subject as to which you are represented by another lawyer."

H. The rule should clarify (one way or another) whether it applies to a lawyer acting on her own behalf or being represented by another lawyer. I think such a lawyer is not "representing a client" but others would disagree. There is no good reason to leave this in doubt.

4.3

A. The proposed added last sentence is a potential trap and should be rejected. **There should be nothing improper about a lawyer being an advocate for his client's position, even in communicating to an unrepresented person**. It is too easy for an unrepresented person to change what a lawyer merely "asserted" into what the lawyer supposedly "advised." If the lawyer made reasonable efforts to correct any misunderstanding about his role (as described in the existing rule), the lawyer should not be held to have acted unethically because the lawyer fairly and vigorously asserted positions which were in the interest of the lawyer's client. The added language creates too great a risk for the lawyer in that situation. The current rule's language should be retained, without the addition of the last sentence.

Elimination of the new proposed last sentence will not preclude a lawyer from suggesting that an unrepresented person secure counsel. Indeed, my discussion of several of the proposed rules assumes that a lawyer can and will give that suggestion in some settings.

B. If the last sentence is adopted, some effort should be made to reconcile its prohibition against giving any advice to an unrepresented person (except to secure counsel) with other parts of the proposed rules that purport to require a lawyer to explain risks, benefits, and alternatives to persons who are not then the lawyer's client with respect to the matter. See, *e.g.*, Rules 1.7(b), 1.8(a), 1.9, 1.12.

4.4

A. If the concept addressed in proposed 4.4(b) is to be in the rules at all, it should be limited to documents which the lawyer "knows" were inadvertently sent. The "reasonably should know" standard incorrectly places the burden on the innocent recipient rather than the negligent sender. Limiting this to lawyers who "know" would not allow a lawyer to close his eyes to the obvious. (See, *e.g.*, comment [8] to proposed Rule 4.2 and comment [8] to proposed Rule 3.3.)

If limited to a knowing receipt of inadvertently sent documents, imposing a duty to notify the sender can be justified as not unduly interfering with the lawyer's obligations to the lawyer's client, while allowing everyone to know that there are issues of privilege and waiver to address. I agree that there may be a substantial benefit to lawyers having this topic clarified.

B. To enhance (or maybe, in this setting, reestablish) an aspect of civility among lawyers, the rule could go further and provide that a lawyer does not violate an ethical duty to the lawyer's client, if the lawyer follows the directions of a person who asserts that such person inadvertently sent the document. Comment [3] to the proposed rule is to that effect. An additional sentence to 4.4(b) could be, "**The receiver of an inadvertently sent document does not violate a duty to the receiver's client if the receiver follows the directions of the inadvertent sender regarding disposition of the document.**" This is important enough that, if it accurately states the Court's intention, it should be in the rule itself. (Comments to rules 1.2 and 1.4 might also reference this.)

5.3

The substance of comment [4] to proposed Rule 1.10 should be added as an express provision in a new 5.3(d):

> Parts (a)-(c) of this rule do not impose a requirement for disqualification on a lawyer by reason of the former employment of a current nonlawyer assistant (even if such former employment would cause disqualification to a similarly situated lawyer under 1.9, 1.10, 1.11, 1.12, or 1.18); provided that a lawyer-employer has an obligation to take reasonable precautions to prohibit nonlawyer employees from disclosing to the current lawyer-employer material confidential information acquired in the course of working for any lawyer, law firm, government agency, or judge other than the current lawyer-employer.

Absent such a provision, the rule itself is ambiguous on its impact in such a situation. Some have opined that the disqualification rules take effect by reason of a nonlawyer's former employment; some require screening; and some recognize that rules for lawyers should not unduly impair employment opportunities for nonlawyers. I concur with the last of these, but I also recognize that the risk of disclosure of confidential information is a legitimate concern. The new lawyer-employer should be responsible for taking reasonable precautions that does not occur. Formal screening is merely one way to implement such measures.

5.4

A. The scope of 5.4(c)'s prohibition is unclear. To clarify, I suggest adding the following:

> Notwithstanding this prohibition, a client may consent [or give informed consent] that someone other than the client (including a person who employs or pays the lawyer to render legal services for the client) can play any role and/or take any action and give any direction which the client could give with respect to the lawyer's professional services.

B. All provisions relating to sharing fees or paying referral fees should be contained in one rule, so as to obtain better consistency. Thus, I would put proposed 1.5(e), 5.4(a), 7.2(b) and any other rules with provisions addressing this topic in one location. 5.4(a) could then merely reference that consolidated rule.

C. I note that proposed 5.4(a)(4) allows for sharing fees with **some** nonlawyers—nonprofits that employed, retained or recommended employment of the lawyer. If the purpose of the rule is to protect the lawyer's professional independence of judgment, why do circumstances within that exception create any less need for protection?

5.5

I agree with Ms. Proctor that the ABA's language needs further review, to take into account at least MCL 600.916 (which prohibits the unauthorized practice of law but excepts a person who is duly licensed and authorized to practice law in another state while temporarily in this state and engaged in a particular matter). The Court needs to address whether the Court or legislature will set the ground rules for dealing with the unauthorized practice of law. (I am not aware of problems caused by the legislative "temporarily . . . engaged in a particular matter" exception.)

5.6

A. As discussed above (in part III.3), I recommend that 5.6(a) be deleted in its entirety. The ethical force behind 5.6(a) was lost by adopting Rule 1.17 (sale of all or part of a law practice) and the fact that there is no shortage of lawyers. Proposed 1.17 expressly states that sale of the good will of a law practice may be conditioned upon the seller ceasing to engage in the private practice of law for a reasonable period of time within the geographical area in which the practice had been conducted. Comment [1] to proposed 1.17 states that such rule permits a sale of a law practice "in the same manner as withdrawing partners of law firms." Simple fairness requires that law firms be able to protect themselves as much as does a buyer of a law practice. The existing (and proposed) rule does not do so.

B. As a possible compromise, the prohibition of 5.6(a) might be limited to enforcing express promises to cease practicing, with the rule allowing monetary consequences. That is, for example, a partnership agreement could include a promise by a departing lawyer not to practice in a reasonable geographical area for a reasonable time (or not represent certain clients), but the only permitted consequence of breaching such a promise might be a reduction or elimination of payments from the partnership, which payments would be made but for the breach. A law firm should not be handicapped by a departing lawyer taking a substantial part of the clientele (which, by itself, may not be wrong) and then demanding payments from the firm, which payments the remaining members of the firm are no longer financially capable of bearing because the client base has departed.

C. If there is concern that clients will be materially limited in their choice of counsel, that risk should be shown as not being mere speculation. Any proposed rule should be drafted to focus on those situations which might actually occur—and which would not be just as likely to arise from the sale of law practice provisions. In the meantime, payments which correlate to valuing the "good will" of a law firm should be permitted to be subject to reasonable covenants not to compete.

5.7

A. In general, 5.7 serves a worthy goal, but it should be limited to addressing "law-related" services **provided to clients of the lawyer as lawyer or to clients of a law firm with which the lawyer is affiliated.** That is, assume A obtains "law related" services from Triple L Services, which is controlled by L, M and N, lawyers who also perform legal services in a law firm called XYZ, P.C. If A is also a client of XYZ, then 5.7's provision should apply, *i.e.*, lawyer standards apply, if reasonable measures have not been taken to inform A that the services from Triple L are not legal services and that the protections of a client-lawyer relationship do not exist. On the other hand, if A is not and never has been a client of XYZ (or L, M or N), there is no justification for applying the Rules of Professional Conduct to services provided by Triple L. A simply has no reasonable basis for inferring that a client-lawyer relationship does exist.

B. Proposed comment [5] is startling and should be in the rule itself, if it accurately reflects the Court's intention. Michigan's proposed comment is **directly contrary to the ABA Model Rule's comment (and the proposed comment [1] to Rule 1.8), although Model Rule 5.7 and the Michigan proposed rule are identical, and it is certainly not an intuitive conclusion from the rule**. The substance (that 1.8(a) need not be met if 5.7 is met) should be found in the rule itself, both here and in 1.8(a).

Perhaps this comment is intended to represent only an illustration of a "standard commercial transactions on terms generally available to others" exception I have discussed in the context of 1.8, but the comment is not limited to that. (At the same time, the proposed comment would not be as broad as that, because the comment would only apply to law-related services, not services entirely unrelated). The proposed comment also appears to assume that 1.8 would otherwise be applicable to a transaction between a client and an entity (not the lawyer) controlled by the lawyer (individually or with others), something that is not necessarily true under 1.8(a), as I have discussed.

C. Proposed comment [10], in part, exceeds the scope of proposed Rule 5.7, where the comment turns to the subject of the promotion of the law-related services. The rule itself speaks only to application of the Rules of Professional Conduct "with respect to the provision of law-related services," not the promotion of such services. Therefore, the last two sentences of comment [10] should be deleted.

6.1

The rule is aspirational, and all aspects of the rule reflect this aspirational (non-enforceable) character by using the term "should" rather than "shall"—**except the opening sentence**. The existing rule clearly treats the entire rule as aspirational and discretionary. If this proposed rule is not intended to be a basis for discipline, I suggest retaining the existing wording and putting the substance of the proposed rule in comments, as a guide to how lawyers might fulfill this aspirational goal.

6.2

The rule should not cover appointment by "a tribunal" because "tribunal" is so broadly defined as to include arbitrators or legislative or administrative agencies. This should be limited to appointments only by courts.

6.3

The rule is a mess. Michigan's rule should be dropped in favor of the ABA Model Rule—which is just part (a) of this proposed rule. Parts (b)-(e) should be dropped. Parts (b)-(e) are written in a "permissive" form and **do not, as written, prohibit anything**. (One is left to wonder just how a violation of subrule (b) can be enjoined, as described in subrule (d), when there is nothing that can violate a "permissive" rule.)

If what this is really intended is to establish a safe haven exception to the application of other rules, such as the conflict rules (1.7, 1.8., 1.9, 1.10) or fee sharing and referral fee rules, that should be made express and the exceptions referenced in the appropriate other rules. Perhaps this would be best addressed by creating a definitional term for "qualified legal services organization" and/or "qualified lawyer referral services" and placing that in Rule 1.0.1. and then making the exceptions in other rules for such qualified organizations.

6.5

The proposed rule needs to be clarified to assure that the rule does not mislead readers into thinking that the rule gives greater protection than it does. The heart of the proposed rule is 6.5(a)(1) and 6.5(b). The proposed structure makes that difficult to see. In addition, as mentioned above, Rule 1.10 should have an express cross reference to this proposed rule.

Proposed 6.5(a)(2) adds no additional protection against imputed conflicts, than already exists by reason of 1.10(a), to the lawyer participating in the short term services program, because 1.10(a) is similarly limited to knowingly representing a client where there are imputed restrictions on the lawyer. So 6.5(a)(2) could simply say: "(2) is subject to 1.10 for imputed conflicts." As written, the result is no different, but a casual reader might be misled into thinking that (a)(2) actually provides some additional protection (or why would it be there?). (If I am in error and there is a difference from 1.10(a), then 1.10(a) should be modified to eliminate that difference.)

On the other hand, proposed 6.5(b) is a significant protection, but it, too, can be stated more plainly: "A lawyer's participation in such a program will not cause imputed conflicts (otherwise imputed by reason of 1.10) for any other lawyer associated with the lawyer participating in such a program."

7.1

A. In general, my recommendation is that the Court remove itself (and the Attorney Grievance Commission) as much as possible from the field of attempting to regulate lawyer advertising. This is a vestige of historical practices and standards that are outdated and are sought to be retained in forms that are forced into distorted rationale to meet First Amendment concerns. If the Court is concerned about rampant falsity in advertising and the adverse effect such might have on unsophisticated consumers, the Court should consider adopting a rule/administrative order that removes any exemption (for regulated conduct) lawyers otherwise might have from the Consumer Protection Act or similar false advertising statutes, if any.

B. If Rule 7.1 is to be retained at all, I recommend language that is narrower and directly correlates to the prohibition in proposed 4.1:

> 7.1 In a communication about the lawyer or the lawyer's services, a lawyer shall not knowingly make a false statement of material fact or law.

In doing so, the Court would not be endorsing lawyers making statements that create unjustified expectations. A broader rule, however, invariably restricts commercial speech and raises substantial First Amendment concerns and (presumably) cost concerns that, together, result in almost no enforcement of this rule by the AGC, despite a plethora of examples of statements that fail the tests of ethics opinions interpreting the terms of (or equivalent to) the existing and proposed rules.

If a lawyer's statement is true, a heavy burden will be placed on an agency trying to enforce the broader terms of the proposed rule—a burden that I don't believe our AGC is prepared to meet. Rather than spar about such things (client testimonials, past results), it is better to have a rule which is clearly valid, violations of which would clearly warrant enforcement, and which tracks the other principal rule on false statements by lawyers (4.1). To do otherwise results, as a practical matter, in a mockery of the rules and leaves such discipline as might be sought to be imposed subject to a valid criticism of selective enforcement that is based on some other unstated criteria. Consider what violations could be asserted to be found in the full page advertisement found inside the front cover of the May 2005 Michigan Bar Journal, which ad trumpets 20 multi-million dollar victories in 2004 (with no mention of ever having suffered any losses or verdicts less than hoped); the suggestion that the advertising firm always wins ("when you need a win"; "the successful advocate"); and that no other firm is as good ("unparalleled"). I don't assert the ad to be false. To the contrary, I assume the specific asserted facts are true and the rest is "puffing." But it is hard to conclude that the ad does not violate the existing rule or the proposed rule, as worded and usually interpreted.

Proposed 8.4 prohibits conduct involving "dishonesty, fraud, deceit or misrepresentation . . . ," making a broad similar prohibition in 7.1 unnecessary, although I see no great harm in reinforcing the concept of truthfulness in lawyer communications about their services, just as Rule 4.1 reinforces truthfulness in statements made in representing clients. The comments to current and proposed 4.1 recognize the concept that a misrepresentation can include

a failure to make a statement in some circumstances. If that is good enough for 4.1, it should be good enough here also.

My recommendation also eliminates concern about distinguishing between public communications and private statements, a distinction that is expressly found in the current rule but is nowhere mentioned in the proposed rule, although proposed comment [3] is written in terms of concern about "advertising." What the Court might be concerned about as possibly misleading in a public communication may be quite different from what is of concern in a private communication, in which the client and lawyer have a give-and-take, and the client might even request that the lawyer communicate some information which the rule, its comments or prior opinions suggest the lawyer cannot communicate. I could go on at length (as no one should doubt by now) on this possible distinction, but, in the long run, the First Amendment applies to both public and private commercial speech, and the Court is better served by expressly prohibiting only false speech.

C. The proposed (and current) provision in paragraph (b) about implying the ability to achieve results by improper means is adequately covered in proposed 8.4(e) (as is true for the ABA Model Rule).

D. If a rule on this topic is retained, I would delete all of the proposed comments, except for [1], [4], and the following additional statement (from the comments to 4.1): "Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

E. Finally, I point out that earlier this year the Ohio Supreme Court (January 24, 2005) issued the following Miscellaneous Order, based on a combination of factors, including a pending proposal for rule change and settlement of a federal court lawsuit which asserted that Ohio's disciplinary rule was unconstitutional:

MISCELLANEOUS ORDERS

In re Enforcement of DR 2-101(A)(3) : ORDER

> Whereas this court is vested with the authority to regulate the practice of law in this state pursuant to Section 2(B), Article 4, Ohio Constitution, It is hereby ordered that the Office of Disciplinary Counsel and all certified grievance committees of local bar associations or the Ohio State Bar Association shall not enforce any purported violation of DR 2-101(A)(3) until further order of this court.

(DR 2-101(A)(3) otherwise prohibits public communications by lawyers that contain any testimonial of past or present clients pertaining to the lawyer's capability.)

7.2

A. 7.2(a) should be deleted. As it currently exists and is proposed in 7.2(a), the language of the rule is awkward and unnecessary—it merely purports to "permit" something that is nowhere else prohibited. 7.2(a) can be deleted without broadening or narrowing the scope of permissible advertising. That may not have been true when the Model Rules were first adopted, because they were drafted at a time when lawyers recently could not advertise at all. That view is dead and gone. A rule is no longer needed to contradict that viewpoint. Whatever restrictions will remain in 7.1 and 7.3 will apply without having to say, in 7.2(a), that they apply. (If proposed 7.2(a) is deleted, proposed comments [1] –[4] can also be omitted.)

B. Proposed 7.2(c) (requiring including the name and office address of at least one lawyer or law firm responsible for an advertisement's content) would be a new requirement for Michigan lawyers. To my knowledge, nothing has been presented to support the inclusion of this additional regulation in Michigan. Adoption of this kind of provision should await a showing that Michigan has had a substantial problem because of its lack of this requirement. It is unlikely for there to be this problem with advertising—**because the point of advertising is to get people to contact the lawyer/law firm.**

C. The entire focus of Rule 7.2 should be what is the subject of proposed 7.2(b), along with all other provisions dealing with referrals, referral fees, and the sharing of fees (thus placing in one location the provisions intended to be put into 1.5(e), 5.4 and the like). The focus of drafting of such provisions, however, should not be to prohibit something merely because it has been prohibited up to now. The focus should be in identifying known problems that need to be addressed—and then limiting the restrictions to those necessary to address those particular problems. The rule should move away from broad restrictions based on concerns over narrow misconduct and toward a recognition that many lawyers compete in a business marketplace in which commonly accepted concepts of what is unethical do not include what has been prohibited to date in the form of referral fees.

Keep in mind that Michigan's rules:

- Have permitted lawyers to pay other lawyers for referrals (*i.e.*, share fees),
- Have permitted paying certain referral services and legal service plans,
- Have permitted sharing fees with some referral services,
- Have permitted paying for purchase of a law practice, and
- Propose to permit *quid pro quo* mutual referral agreements with other lawyers and nonlawyers.

There simply is no longer a good reason to pretend to have a general prohibition on paying "anything of value" for referrals or recommendations.

If the concern is that such payments result in increased fees being charged by lawyers, that is an insufficient reason to justify the prohibition—as illustrated by all of the exceptions. Moreover, just as Rule 1.5(e) requires (now and as proposed) that the client's total fee remain

reasonable, a similar provision can be applied in the situation of other referral payments. A new 7.2 could include the statement that "any referral compensation paid by the lawyer cannot be used in justification for the reasonableness [or lack of excessiveness] of the fee charged by the lawyer to the client."

If the concern is that a referral source will make misrepresentations to unsophisticated consumers about the lawyer's services, then address that narrow problem. Note that same problem could exist in the "mutual referral" setting the proposed Rule 7.2(b)(4). Indeed, a focused rule might require a lawyer knowingly obtaining clients through a paid referral source to request that a prospective client disclose any statements or representations made to the prospective client by the referral source about the lawyer or lawyer's services, with the lawyer required to affirm or disaffirm the accuracy of such statements/representations. (The Court also might require written engagement agreements, signed by the client, when an engagement knowingly arises from a paid referral, with large font bold print disclaimers about prior representations by the referral source.) The point is that there can be focused restrictions, supported by compelling circumstances. Those compelling circumstances do not, however, support a general prohibition.

If the concern is that a client might object to someone else being paid for a referral, then address that concern, just as it is addressed in existing 1.5(e) and/or proposed 7.2(b)(4)—require that the client be informed of the referral/fee sharing arrangement and require that the client not object or expressly consent.

D. Whether the Court narrows the prohibition or maintains a general broad prohibition on paying for referrals, the language should depart from the current "anything of value" standard and move to a standard of "material compensation" or set a particular level of *de minimis* compensation below which there is no prohibition. The rule should not prohibit providing nominal expressions of gratitude for past referrals or minor expense reimbursements to referral sources. If necessary, put an annual cap on such gifts. There certainly are other areas where such caps exist (*e.g.*, MCJC 5C(4)(a) allows gifts—not exceeding $100—to judges incident to a public testimonial; lobbying statutes permit minor meal expenditures for public officials). Nominal gifts (*e.g.*, a box of candy, a meal, a bottle of wine) are common in the business world; are not understood, in any common sense meaning of the term, to be "unethical;" and are insufficient to represent a threat that the recipient will be so overwhelmed as to proceed to overreach and misrepresent matters to prospective clients in order to continue to receive such gifts in the future.

The State Bar of Arizona, in Opinion 2002-01 (Jan 2002), opined that gifts of value less than $100 to an attorney or a non-attorney after a client referral as an expression of thanks and not a *quid pro quo* payment are not prohibited, despite Arizona having a rule prohibiting giving "anything of value" for recommending a lawyer's services. Other jurisdictions (*e.g.*, Rhode Island), however, have strictly read the rule's prohibition even as to minor gifts. Arizona's interpretative ruling would not be permissible in Michigan, where the Court would apply a rule's plain meaning. Thus, the rule itself needs to be changed.

Another example of the extent to which "anything of value" can be applied is where a lawyer offers to give discounts to members of an organization (*e.g.*, a chamber of commerce or other organization of businesses, or a social club or even a church), which the organization publicizes in its informational materials, materials which are also used, in part, to gain new members. The discount would benefit the prospective client but it cannot be denied that some nominal value (not cash or services) is going to the organization—maybe someone will join because of, in part, the benefit. RI-147 (10/23/1992) ("If the Chamber uses the . . . the law firm's willingness to provide discounts to Chamber members as an incentive to attract members, the law firm, by permitting that use, has given the Chamber 'something of value' in exchange for the recommendation of the law firm.") That kind of "value" should not be sufficient to cause a concern.

E. To sum up, if there is real evidence of a threat to clients and potential clients that needs to be addressed (not just a squishy uncomfortable feeling about referrals and lawyers), then draft the rule to narrowly focus on that threat, but don't prohibit everything else also. Common sense does not have to be abdicated merely because the discussion involves lawyer ethics. This does not involve confidentiality or privilege or duty to clients, and ridding the rules of this topic (or severely limiting it) will not harm the core of the attorney-client relationship or role of lawyers.

7.3

A. The proposed (and current) rule should be substantially rejected or deleted. If regulation is needed (and shown to be needed, not assumed or declared to be "inherent"), then the Court should focus on those situations where regulation is needed, keeping in mind that some regulation could be left to the legislative arena. (Michigan has an anti-solicitation statute—MCL 750.410. The Federal CAN-SPAM act and "do not call" registries also address some aspects.)

B. The subject of current 7.3(b) (also in proposed 7.3(b)) is a legitimate one of honoring a "do not solicit" position by a prospective client and prohibiting coercion, duress and harassment. Indeed, that could be the sole subject of this rule.

C. Fears about abuse of direct in-person, live telephone or real-time electronic contact are unsupportable as to potential clients who are sophisticated business persons. The rule, however, makes no distinction between a recent widow and the CEO of a Fortune 100 business. If concerns for overreaching have any merit (the evidentiary support needed to overcome a First Amendment challenge probably has not been created in Michigan), those concerns are in narrow areas. A focused rule should be restricted to addressing those narrow areas. If something more can be shown to be needed, then perhaps expand the prohibition to individual consumers for non-business related representation (although such might be characterized as paternalistic humbug and unfair to such consumers).

D. If an anti-direct contact solicitation provision is going to be retained, then the exceptions in (a)(2) must be broader. Any prior business (not just "professional") or personal relationship should suffice, as well as common membership in any business organization. (Does anyone really intend that the AGC should spend its precious limited resources seeking to impose discipline on a lawyer/member of a local Chamber of Commerce (or "Rotarian") who attends such an association meeting and, in the course of that, suggests that, if another member has need for a lawyer, this particular lawyer would like to provide that service?)

If the concern is that which is expressed in the proposed comment (undue influence, intimidation, and overreaching of persons already overwhelmed by the circumstances giving rise to the need for legal services), then the rule should focus on that. Require a written engagement agreement involving any client who is the subject of in-person, live telephone or real time electronic solicitation; give such a client a set period to opt out of the engagement, if a similar set time has not expired between the solicitation and the written agreement; and require that the engagement agreement disclose (or disclaim in large font, bold type) any representations made in the course of the solicitation.

E. In evaluating whether to adopt the proposed rule, stick with the rule as it currently exists, or focus the scope of the rule on true problem situations, I ask that the Court keep in mind what is and is not prohibited under the proposed rule, with the exceptions that are proposed. I will not list all of the scenarios here (solicitations of a prospective client/widow's close relatives, a union representative, a corporate CFO, an environmental interest group, attendees at seminars,

etc.) Anyone doing so will easily see that the distinctions created in the proposed rule lead to nonsense. Such nonsense will often result from using narrow situations (that may deserve special protection) to draft an overbroad rule that covers so much more that does not need protection.

F. An additional exception to the "no live solicitation" rule (if that is to be preserved) has been left unstated in proposed 7.3(a). One might infer the exception (the invited solicitation) from the term "solicit," although my dictionary definition does not confirm such an exception. Nothing in the rule expressly provides for or recognizes such an exception, although one might think it is a matter of common sense. (If the Court has a better dictionary that makes lack of prior consent a necessary part of any "solicitation," I would be all for using that dictionary.)

For example, consider a permitted written solicitation that requests that the recipient return a postage paid card if the recipient wants to learn more about the benefits of hiring Lawyer X. The card is returned as requested, and Lawyer X calls the recipient. Is that a prohibited live telephone solicitation or not? The lawyer may make the identical statements he would have if he had called in the first place, without the post-card dance. Will it make a difference if the first written solicitation expressly says that the second one (upon return of the card) will be by phone or in person?

This omission (or, more charitably, potential ambiguity) could be cured with an express exception added to proposed 7.3(a)(3): "has communicated a willingness to be solicited." (Such a communication reasonably may be inferred from the choice to attend a "seminar" conducted by a lawyer on a topic of interest to the attendee, not just from return post cards.)

G. An alternative to an outright ban on in-person solicitation would be to create presumptions and/or burdens of proof, depending on whether a "live" solicitation was involved. For example, there could be a presumption that such a solicitation included the use of false statements or assignment of a burden of proof to the lawyer to show an absence of undue influence or false statements in consumer settings. If that burden of proof is met (or presumption rebutted), however, there should be no threat of discipline for violation of a non-solicitation rule. The harm intended to be avoided having not occurred, there would remain no valid basis for the rule (unless, of course, the real reason for the rule is merely a lingering vestige of the "good old days"—which never really existed—when a lawyer hung up a shingle and clients just came marching in the door). On the other hand, if the rule is merely seeking to avoid annoying members of the public, annoyance is not increased or decreased because the solicitator is a lawyer.

H. There has been presented insufficient justification for adding the proposed 7.3(c) (labeling "advertising"). (In this regard, I concur in Ms. McAllister's comments on behalf of Dykema.) Michigan has not required this in the past, and I have not seen any information suggesting that Michigan residents have suffered because of that omission. Proposed 7.3(c) appears to be a solution in search of a problem. The particular historical problem, if any, should be identified and a rule developed that focuses on that problem.

I. The comments to the proposed rule should be carefully reviewed and revised to reflect any changes made in the proposed rule or other rules referenced in the comments. In addition, the last sentence of comment [5] should either be deleted or its substance placed in the rule. Interpreting a lack of response as equivalent to making known a desire not to be solicited or as harassment is not intuitive. If that is how a failure to respond should be interpreted, then the rule should be revised to reflect that. (I suspect that this is another example of an ABA compromise finding its way into a comment because of lack of support for it to be in the rule.)

7.4

A. Existing 7.4 can and should be substantially deleted as unnecessary, as it mainly permits something that is nowhere prohibited. It is only needed if a provision such as proposed 7.4(d) is adopted. There is no good reason, however, for Michigan to jump back into the quagmire of "specialist/specialty/certified/etc.," having escaped from that quicksand in 1988. No Michigan authority has attempted to set up certifications for specialists. If the Bar and this Court have found the topic to be of so little interest, it should be left out of the rules. Just leave the subject to Rule 7.1's prohibition on false statements.

B. The point of proposed 7.4(d)(2) may be worth adopting, by providing simply: "If a lawyer states or implies that a lawyer is certified as a specialist in a particular field of law, the name of the certifying organization must be clearly identified in the communication." As explained in the last sentence of proposed comment [3], this would enhance a consumer's ability to access useful information about such organization.

7.5

A. The substance of subparts (b) and (c) of the proposed rules are all that are needed to be retained. The substance of (a) and (d) is adequately addressed by Rule 7.1. Subject to my comment below as to 7.5(d), there is no great harm, however, in retaining the substance of those provisions here, other than such harm as results from continuing a practice of having unnecessary rules.

B. The first sentence of 7.5(a) does nothing more than say that Rule 7.1 applies to names, designations and professional designations, but that is hardly necessary. The remainder of proposed (and existing) 7.5(a) (dealing with trade names) is written in a permissive form that prohibits nothing. If the Court believes that redundant provisions are helpful to drive home the obvious or that there will be a gap in 7.1's coverage (because 7.1 may be narrowed to false statements, as I suggest) of misleading names, etc., then the essence of 7.5(a) could be reworded, so that such subpart would read:

> Firm names, letterheads or other professional designations are subject to the prohibitions in 7.1. In addition, a lawyer in private practice shall not use a trade name, if such use implies a connection with a government agency or with a public or charitable legal services organization and such connection does not exist.

C. Eliminating 7.5(d) also could put the focus of name regulation back where it belongs—prohibiting, under 7.1, false statements that a firm is involved, rather than two separate practices—instead of encouraging silly nuances on firm names (*e.g.*, whether a name can or cannot include a former partner (who remains affiliated) in a firm, depending on whether the former partner retired, became "of counsel" or just continues as an employee). Using concepts of who may be personally liable as a result of a firm's services as a standard for what a firm name can be was already over-stretching the rule's application (because, clearly, not everyone whose name is used is liable and not everyone who is liable has her name used). With the advent of limited liability companies and limited liability partnerships, using such concepts makes no sense at all. The point is (as it always should have been) whether a name is a false representation that a client will be a client of a firm or a client of merely part of what may appear to be a firm. That concern, however, is adequately addressed by Rule 7.1.

D. The comments should be altered to reflect any changes made in the rule. (The comments on what may be false or misleading could remain as mere illustrations, not binding rules.)

7.6

I agree with the Representative Assembly that this possible new provision not be adopted.

8.1

The exception to existing and proposed 8.1(a)(2) should include information "protected by law" as well as information protected by Rule 1.6. Comment [2] recognizes that the protection is broader than merely Rule 1.6. The rule should state that.

8.2

The general rule in 8.4(b) as to dishonesty and misrepresentations that reflect adversely on the lawyer's honesty or fitness as a lawyer is sufficient to address the topic of 8.2(a). This kind of provision invites abuse and retaliation. Judges (and candidates) should develop thicker skins.

I would also delete comment [1].

8.3

A. Whether to support retaining parts (a) and (b) of the existing rule or use the language in the proposed rule depends on whether the change is intended to really change the standard for when a duty to report arises. When Michigan previously adopted its version of the then ABA Model Rules, Michigan added terms (perhaps for emphasis or maybe just for clarity) such that a duty to report arises when there is a significant violation of the rules and a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer is raised. Under the grammar of the sentence in the existing and proposed rule, the phrase "raises a substantial question . . ." modifies the singular noun "violation," not the other possible antecedent—the plural "Rules."

Under that reading of the proposed and existing language, the issue is whether there is a difference between a standard requiring reporting of "a violation . . . that raises a substantial question . . ." or reporting of "a significant violation . . . that raises a substantial question . . . ." The issue is not whether the rule being violated is significant or whether any violation of the rule raises a substantial questions. The issue is whether the violation itself warrants reporting. If any violation that actually raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer must be deemed to be a "significant" violation, then the addition of "significant" is a redundancy that can and should be eliminated, as proposed.

B. I suggest a further temporal clarification to (a) and (b), to address whether the misconduct is currently indicative of the lawyer's fitness to remain a lawyer—that is, as of the time knowledge of the violation is acquired, rather than when the violation occurred or in the abstract. Consideration should be given to inserting the following language between "that" and "raises" in each part (whether using the current Michigan rules or proposed rules):

", as of the time such knowledge was obtained,"

Thus, under (a), the provision would require a report to the AGC if one knows that another lawyer "has committed a violation of the Rules of Professional Conduct that, as of the time such knowledge was obtained, raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ."

The following scenario is a basis for the suggestion:

In 2005, Lawyer A discovers that, in 1980, Lawyer B misappropriated a minor amount of funds from a law firm in which B was a partner as a result of a mental breakdown Lawyer B suffered in 1980. Lawyer B retained his membership in the bar, sought medical and psychiatric treatment, recommenced practicing in the same law firm and repaid the funds. Psychiatric and medical tests explained the earlier circumstance and experts pronounced that Lawyer B presents no greater risk for repeating the earlier conduct than would be true for any other lawyer who had not had the breakdown.

Misappropriating even minor amounts might reasonably be viewed as raising a substantial question about the honesty of the lawyer—at least at the time of the events. In view of all of the facts, however, Lawyer A has no actual substantial question, nor does he think it would be reasonable—in 2005—to have such a question as to Lawyer B's honesty in 2005. The rule should not require a report of the 1980 incident.

C. Rule 8.3 may be the rule that should contain the substance of the requirement now found in MCR 9.120(A) concerning reports of criminal convictions. As indicated above, standards of lawyer conduct should be placed in the Rules of Professional Conduct, not in a court rule that is better suited to setting forth disciplinary procedures. See also my discussion, as to Rule 8.4, on the subject of petty crimes.

8.4

A. My principal objection to proposed (and existing) 8.4 is that the rule should be revised to include the other grounds for disciplinary proceedings currently found in MCR 9.103 and 9.104. If conduct is to be a possible basis for discipline, Michigan lawyers ought to be able to find it here and not have to search elsewhere. At the same time, 9.103 and 9.104 should be revised to merely reference the standards found in the Rules of Professional Conduct. This may avoid gradual amendments to those Court Rules, adding grounds for discipline without corresponding amendments to the Rules of Professional Conduct. (If the rules are purely duplicative of each other, no real harm occurs from such duplication, but it is bad administrative management.)

B. Substantively, a choice should be made as to whether what is now in 9.103 and 9.104 should be grounds for discipline. The proposed rules do not address that.

As a personal choice, I suggest deleting 9.104(A)(2) and (3), revising 9.104(A)(1) (as discussed below with respect to its counterpart in 8.4(d)), and removing sufficiently petty misdemeanors (anything with a potential sentence of 90 days or less) as a violation. There can be good arguments on the crime issue, but, particularly since some states may still treat traffic violations (or even parking violations) as petty misdemeanors, some degree of common sense ought to be applied. Perhaps the standard should be criminal conduct which, if committed in Michigan, would not be merely a civil infraction.

If the Court intends to retain a provision that justifies lawyer discipline for any criminal conduct, then 8.4(b) should delete reference to professional misconduct being for only certain kinds of criminal conduct (those which reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects). It is misleading to leave 8.4(b) as proposed and then execute a "gotcha" by using what is currently hidden in MCR 9.104(A)(5).

C. The substance of the second sentence of comment [1] to 8.4 should be incorporated as an express part of 8.4(a). One might think this is unnecessary, but consider for example, a circumstance under Rule 4.2 (communications with a represented party/person). Although a lawyer cannot make such a communication and cannot use the lawyer's client as a hand-puppet to make such improper communications, the rules should also clearly recognize that the lawyer is not prohibited from explaining to a client that such client is legally entitled to directly communicate with the opposing party/person. Currently, the vague provision in 8.4(a) is cited as the basis for prohibiting the "hand puppet" type of scenario, but the rule does not adequately preserve the right described in the comment.

D. 8.4(d)'s prohibition on "conduct that is prejudicial to the administration of justice" is too vague. (I don't mean this as a due process kind of vagueness.) The proposed comments reference only conduct which Michigan already prohibits in an express rule (current 6.5, proposed 6.6). My suggestion is that the Court, in deciding whether to keep this prohibition, attempt to specify whatever conduct the Court intends to be covered by this category. Most, if not all, of such conduct probably is already covered by another rule, if the conduct is

significant—or could be covered by a more specific rule designed to address the conduct. In end, however, the Court may conclude that there is sufficient value in retaining an "I know it when I see it; I just cannot describe it" kind of rule.

If such a vague rule is retained, however, I recommend that a qualification be added that this "catch-all" may not be used to find this rule violated by conduct in situations which are addressed by other specific rules. That is, if a rule generally addresses a topic, lawyers should be entitled to rely on the scope and plain meaning of the rules as adopted. If the lawyer's conduct does not violate the rule, then the conduct should not be declared to be misconduct by reason of this catch-all. That would still leave the rule available to be applied in unanticipated circumstances where no specific rule exists but the conduct is such as any lawyer should understand would be clearly improper.

E. In addition, if the vague standard in 8.4(d) is retained, then descriptions of what is not intended to be prohibited—as described in some of the proposed comments—should be made express parts of the rule. See the last two sentences of proposed comment [3] and the first sentence of proposed comment [4].

F. The above criticisms would be applicable to other similar "catch-all" provisions which should be imported from MCR 9.104, if they are not merely deleted: 9.104(A)(2) ("exposes the legal profession or the courts to obloquy, contempt, censure, or reproach"); and 9.104(A)(3) ("contrary to justice, ethics, honesty or good morals"). Those rules are even less compelling than the "prejudicial to the administration of justice" category. If another standard (including one prohibiting conduct prejudicial to the administration of justice) is not already violated by conduct which supposedly violates these standards, then the conduct probably is not sufficiently harmful to warrant being called misconduct. Retaining these other vague categories merely provides opportunities for discriminatory selective enforcement and imposition of discipline, something not worthy of our disciplinary system.

G. The comments to proposed 8.4 should be corrected, based on what the Court does to the rule itself. Comment [2], for example, would be inappropriate if the Court will retain the broader statement that any "crime" (including a parking or traffic violation in another state) constitutes professional misconduct, as currently described in MCR 9.104(5).

8.5

A. The new part of proposed 8.5(a) which extends application of the rules to someone who "provides or offers to provide any legal services in this jurisdiction" is somewhat unclear. Is it limited to situations where the legal services are provided or intended to be provided in Michigan? (I think that is the intent.) Or does it mean the rules apply to offers made in Michigan, even if the services are to be provided elsewhere? Perhaps the English language is too ambiguous to clarify this simply. I suggest, however, that the second sentence in proposed 8.5(a) could be revised to:

> A lawyer not admitted in Michigan is also subject to the disciplinary authority of Michigan
>
> i. If the lawyer provides legal services in Michigan; or
>
> ii. If, pursuant to an offer by the lawyer to provide legal services, the legal services would be provided in Michigan.

B. As a matter of simplicity, I recommend leaving the choice of law to (b)(1) (with some modification) and the first clause of the first sentence in (b)(2) (the jurisdiction in which the lawyer's conduct occurred), retaining the second sentence as an absolute defense the lawyer can raise. One suggested modification to (b)(1) arises from the definition of a "tribunal" as including an arbitrator. Unlike a judicial tribunal, an arbitrator may "sit" in several jurisdictions and the location of such "sitting" could be entirely fortuitous—based merely on convenience. In such a setting, the choice of law should fall back to the location of the lawyer's conduct. A second modification would address the situation of a Michigan lawyer whose only contact with a matter is attending a deposition in Michigan with respect to a case pending in some other jurisdiction.

Thus, (b) would read:

> (b) Choice of Law. In any exercise of the disciplinary authority of Michigan, the rules of professional conduct to be applied shall be as follows:
>
> 1) For conduct in connection with a matter pending before a judicial tribunal, the rules of the jurisdiction in which the judicial tribunal sits, unless the rules of the judicial tribunal provide otherwise or the lawyer's only conduct in connection with the matter occurred in another jurisdiction; and
>
> 2) For any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred. A lawyer shall not be subject to discipline, however, if the lawyer establishes that the lawyer's conduct conformed to the rules of a jurisdiction in which the lawyer

> reasonably believed the predominant effect of the lawyer's conduct would occur.

C. Comment [1] should be shortened to the first two sentences. The rest are not mere comments to this proposed rule. If the second to last sentence (re appointment of an official to receive service of process) is intended to be accurate, then its substance should be placed directly in a rule. If my proposed revision were to be adopted, then comments [4] and [5] should be modified to reflect the change. If comment [7] is stating something other than a proposition that must be applied as a matter of law, then it should be placed in the rule itself.

V. Conclusion

This is an extensive submission, because a comprehensive change to the rules governing lawyers' professional conduct merits such a comprehensive review by someone looking at what should be done in Michigan, rather than primarily relying on what the ABA decided (and compromised) based on interests and influences from all jurisdictions in the United States. The Court's review should not address merely what the ABA has proposed, but also the wording of our existing rules, whether or not the ABA has proposed making a change.

As stated at the outset, my recommendation is that the proposed rules be assigned for further detailed examination by a committee of the Court's choosing, including the State Bar Ethics Committee (maybe with one of the Court's Commissioners assigned to assist). The State Bar Ethics Committee has talented and knowledgeable members. My disagreement with their previous recommendations is, I believe, a result of the Committee not treating its role as performing as extensive an examination as I suggest needs to be done. The Court could, of course, use the comments it has received to date to give some guidance to whatever committee is chosen to complete the review task.

Ultimately, whatever is adopted should meet the test which this Court will apply in interpreting the rules—the plain meaning of those rules. This Court, therefore, has the obligation to review the rules, in light of their plain meaning, and decide if such meaning is what the Court truly intends.

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